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Supreme Court, U.S.
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No. 07-07-79

IN THE

Supreme Court of the United States

AMIRI BARAKA,

Petitioner,

v.

JAMES E. MCGREEVEY, individually; JON CORZINE, in his official capacity as Governor of the State of New Jersey, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the former governor of New Jersey and former chairperson of the New Jersey State Council on the Arts entitled to absolute legislative immunity from suit in their individual capacities for orchestrating and directing the elimination of petitioner Amiri Baraka's position as Poet Laureate of New Jersey, and for their actions leading up to that elimination, in response to Baraka's public reading of a controversial poem written by him? Moreover, in determining whether state officials have engaged in legislative acts, must a court evaluate whether their acts are substantively, as well as formally, legislative, and if so, what test should be used to assess whether an act is substantively legislative?

2. Even assuming that the former governor and former agency chairperson are entitled to absolute legislative immunity from suit in their individual capacities, does that immunity block Baraka's claims seeking prospective injunctive relief against these executive officials and their successors in their official capacities? In other words, can a personal immunity, such as absolute legislative immunity, *ever* bar a claim for prospective injunctive relief against a state official in his or her official capacity?

PARTIES

Petitioner Amiri Baraka was the plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

The defendants in the district court were respondents James E. McGreevey, individually and in his then-official capacity as Governor of the State of New Jersey; the State of New Jersey; the New Jersey State Council on the Arts; Sharon Harrington, individually and in her then-official capacity as chairperson of the New Jersey State Council on the Arts; John Does 1-10, in their individual and official capacities; Mary Does 1-10, in their individual and official capacities; and unknown agencies and government entities 1-10. These same defendants were also appellees in the court of appeals proceedings, except that Richard J. Codey, in his official capacity as Acting Governor of the State of New Jersey, was substituted for former Governor James E. McGreevey, in his official capacity.

In this Court, pursuant to this Court's Rule 35.3, respondent Jon Corzine, the current Governor of New Jersey, in his official capacity, is substituted for respondent former acting Governor Richard J. Codey. Similarly, respondent Carol Ann Herbert, the current chair of the New Jersey State Council on the Arts, in her official capacity, is substituted for respondent former chair Sharon Harrington. Former Governor McGreevey and former chairperson Harrington, in their individual capacities, are also respondents in this Court, along with the other defendants/appellees from the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner Amiri Baraka respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. That court held, over a strenuous dissent, that former Governor James E. McGreevey and former chairperson of the New Jersey State Council on the Arts, Sharon Harrington, were entitled to absolute legislative immunity for directing and orchestrating an effort, culminating in legislation, to eliminate Amiri Baraka's position as Poet Laureate of New Jersey in retaliation for his public reading of the controversial poem he wrote regarding the attacks against the United States on September 11, 2001. As the dissenting judge recognized, the Third Circuit's decision extended legislative immunity far beyond the bounds set by this Court, effectively conferring absolute legislative immunity on any activity by executive officials with even a slight connection to the legislative process. Moreover, in expanding legislative immunity to actions by executive officials that are not "integral steps in the legislative process" and that target a particular individual for differential treatment, the Third Circuit's decision creates a conflict among the courts of appeals that should be resolved by this Court.

The court of appeals held not only that Governor McGreevey and Harrington were entitled to legislative immunity in their individual capacities, but also that legislative immunity barred Baraka's claims for reinstatement against them in their *official* capacities. In ruling that absolute legislative immunity can block an official-capacity suit for prospective injunctive relief, the Third Circuit deepened an already existing conflict in the circuits between the Eleventh Circuit, whose side the Third Circuit—and just last week, the Second Circuit—has joined, and several other Circuits, which have recognized, consistent with this Court's precedents, that personal immunities such as absolute legislative immunity do

not apply to actions for prospective injunctive or declaratory relief against state or local officials in their official capacities.

OPINIONS BELOW

The opinion of the court appeals, Pet. App. 1a-43a, is reported at 481 F.3d 187 (3d Cir. 2007). The district court's memorandum opinion, *id.* at 46a-58a, and accompanying order dismissing the case, *id.* at 59a, are not reported.

JURISDICTION

The court of appeals entered its judgment on March 21, 2007. Pet. App. 44a-45a. On May 30, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 19, 2007. *Id.* at 63a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 60a-62a.

STATEMENT OF THE CASE

A. The Facts

1. In 1999, the New Jersey legislature established the New Jersey William Carlos Williams Citation of Merit, to be presented to a distinguished poet from New Jersey, who would serve as the Poet Laureate of the State of New Jersey for a period of two years and receive an honorarium of $10,000. N.J. Stat. Ann. § 52:16A-26.9(1)(a), P.L. 1999, c. 228 (Pet. App. 60a-61a). Under the statute, the New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts ("Arts Council"), was required biennially to appoint an expert panel to select the poet to whom the governor would present the citation of merit and who would serve as poet laureate for a two-year term. § 52:16A-26.9(1)(b). The poet laureate was required to "engage in activities to promote and

encourage poetry within the State and . . . give no fewer than two public readings within the State each year while the poet holds the laureate designation." § 52:16A-26.9(1)(d).

2. In July 2002, New Jersey Governor James E. McGreevey presented the William Carlos Williams Citation of Merit to internationally renowned poet Amiri Baraka, who began serving his two-year term as Poet Laureate of the State of New Jersey. Second Amended Complaint (R. 3) ("2d Am. Cmplt.") ¶ 12.[1] On September 19, 2002, Baraka attended the 2002 Geraldine R. Dodge Poetry Festival in Stanhope, New Jersey, and read his poem, "Somebody Blew Up America," a poetic assessment of the September 11 attacks against the United States. *Id.* ¶ 14. The poem criticized America's policies and actions in society and international politics, expressing views that Baraka had stated before and after his appointment as poet laureate. *Id.* ¶ 26. The poem included the lines:

> Who knew the World Trade Center was gonna get
> bombed
> Who told 4000 Israeli workers at the Twin Towers
> To stay home that day
> Why did Sharon stay away?

Id. ¶ 14.[2]

Baraka's reading of the poem provoked an immediate outcry and was widely publicized in the press. Numerous organizations called on the State of New Jersey and respondent Governor McGreevey to "fire" or "remove" petitioner from his

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[1] These facts are drawn from the Second Amended Complaint, which the district court dismissed before discovery.

[2] The full text of the poem, dated October 2001, is in petitioner's Brief and Appendix Volume I in the court of appeals. It is also available at http://www.amiribaraka.com/blew.html.

position as poet laureate. *Id.* The governor was outraged at what he called the "anti-Semitic" tone of the poem and publicly demanded that Baraka resign as poet laureate. The governor's spokesperson stated: "The governor strictly criticizes any racist or anti-Semite behavior. The style of Baraka's recent verse implies that Israelis had known about the September 11 terrorism attacks." *Id.* ¶ 15. Baraka denied his poem was anti-Semitic, refused to resign, and declared his intention to complete his term as poet laureate. *Id.* ¶ 16.

In response to Baraka's refusal to resign, Governor McGreevey directed respondent Sharon Harrington, chairperson of the Arts Council, the agency with administrative responsibility for paying the honorarium to the poet laureate and coordinating his activities, *id.* ¶ 8, to withhold payment of Baraka's $10,000 honorarium. *Id.* ¶ 17. Lacking statutory authority to remove Baraka formally, Governor McGreevey, together with other defendants, commenced "a concerted campaign" to abolish Baraka's position as poet laureate altogether. *Id.* ¶ 18. Governor McGreevey, along with his agents and staff, "orchestrated and directed" this campaign. *Id.* ¶ 20. At "the urging, direction and request" of the governor and other defendants, the New Jersey legislature passed legislation in July 2003 abolishing Baraka's position as poet laureate, effective immediately, P.L. 2003, c. 123 (Pet. App. 62a), in retaliation for Baraka's reading of his poem. 2d Am. Cmplt. ¶ 19. Thereafter, Baraka was denied the opportunity to complete the second year of his term as poet laureate, along with his $10,000 honorarium. *Id.* ¶ 24.

3. Legislative events and statements accompanying the statute leave no doubt that its purpose was to remove Baraka specifically from the position of poet laureate. An array of bills and resolutions condemning Baraka and calling for his resignation or proposing to eliminate the poet laureate's honorarium, give the Governor authority to remove the current poet laureate, or abolish the poet laureate position altogether

were introduced in the New Jersey legislature as soon as October 2002.[3] Statements accompanying many of the bills made clear that their purpose was to renounce Baraka's views by removing him as poet laureate. For example, as introduced, the Senate bill that ultimately became law would have given the Governor the power to rescind the citation of merit and remove the poet laureate, including the then-serving poet laureate. *See* Senate Bill No. 21, as introduced on October 17, 2002. The Statement accompanying that bill explains in part:

> The bill provides that the poet laureate will be appointed by and serve at the pleasure of the Governor, ensuring the selection of a poet laureate who can serve this State in a civil and positive manner, and giving the Governor the ability to remove a poet laureate when that person acts inappropriately, for example by bringing shame upon the government and people of this State.
>
> The law creating the New Jersey William Carlos Williams Citation of Merit was enacted as a means to educate, ennoble, and enrich the society of this State.

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[3] *See, e.g.*, Assembly Resolution No. 192 (calling "for the resignation of New Jersey's poet laureate, Amiri Baraka") (introduced Oct. 10, 2002); Assembly Bill No. 2864 (proposing to eliminate the $10,000 honorarium, which act would "apply to the poet laureate holding the designation on the effective date of this act") (introduced Oct. 10, 2002); Senate Bill No. 1981 & Assembly Bill No. 2907 (proposing a procedure for removing a poet laureate "if the person is not fulfilling the duties of the position or for actions that are determined to negatively impact the dignity, integrity, and reputation of the position of poet laureate and serve to denigrate in any way the good name, status, and reputation of this State and its people") (both introduced Oct. 17, 2002); Assembly Bill No. 2859 (authorizing the Governor to remove the poet laureate) (introduced Oct. 10, 2002); Assembly Resolution No. 237 (denouncing the Newark school board "for appointing Amiri Baraka as poet laureate of the Newark school district") (introduced Feb. 3, 2003). The bills, resolutions, and committee statement cited herein are available at http://www.njleg.state.nj.us.

> The poet laureate should promote humaneness, compassion, and good will. The position has instead, despite these intentions, become a State-sanctioned and subsidized means to espouse some of the most hateful and bigoted sentiments ever uttered by a resident of this State.

Senate Bill No. 21 (2002); *accord* Assembly Bill No. 2857 (including same Statement) (introduced Oct. 10, 2002).

Ultimately, the legislature enacted a substitute for Senate Bill No. 21 reported out by the Senate State Government Committee. The substitute repealed the law creating the position of poet laureate and was accompanied by the Senate committee's statement that "[b]y repealing the statute, [the substitute] terminates the position of the current State poet laureate." Senate State Government Committee Statement to Senate Committee Substitute for Senate Bills Nos. 21 and 1981 (Dec. 12, 2002); *accord* Assembly Bill No. 3313, accompanying Statement (introduced Feb. 6, 2003).

Proponents of the bill stated during floor debates that the measure was not about "readjusting or restructuring a minor post" in New Jersey, but about whether Baraka's "views are going to be repudiated." Statement of Sen. Byron Baer (Jan. 23, 2003) [01:32:10 / 02:38:39].[4] The bill's primary Senate sponsor, as he moved for a vote, maintained that discussions were ongoing in an attempt to reach agreement on how best to convey the "sense of displeasure and lack of confidence in the legislature with regard to the current poet laureate." Statement of Sen. Peter Inverso (Jan. 23, 2003) [02:35:10 / 02:38:39].

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[4] Recordings of the legislative debates are available on the New Jersey Legislature's website. The Senate debates are at http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=S&SESSION=2002, and Assembly debates at http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=A&SESSION=2002. The times of the cited recordings are provided in brackets.

Similarly, in moving the bill for a vote in the Assembly, the principal Assembly sponsor rued that it was "unfortunate that Mr. Baraka did not heed calls . . . to step down, necessitating this particular legislation to eliminate the position." She urged her colleagues "to join [her] in standing up against anti-Semitism and the perpetuation of hurtful lies—and dangerous lies" by voting for the measure. Statement of Assemblywoman Linda Greenstein (June 30, 2003) [05:51:10 / 06:07:04].

B. Proceedings Below

1. On April 26, 2004, petitioner filed a complaint in the U.S. District Court for the District of New Jersey, naming as defendants Governor McGreevey in his individual and official capacities; Arts Council Chairperson Harrington, in her individual and official capacities; the State of New Jersey; the Arts Council; and individuals and agencies unknown to petitioner. The complaint sought relief pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 2201 *et seq.* Jurisdiction was based on 28 U.S.C. § 1331. Petitioner alleged that the defendants' actions in abolishing his position as poet laureate on the basis of "Somebody Blew Up America" violated his right to free speech under the First Amendment and that the defendants' suspension of payment of the statutorily authorized honorarium without a prior hearing violated Baraka's Fourteenth Amendment right to due process. 2d Am. Cmplt. ¶¶ 28-44, 50. He also alleged supplemental state-law claims. *Id.* ¶¶ 45-48, 51-71. Baraka requested as relief, *inter alia,* payment of his $10,000 honorarium, immediate reinstatement to the position of poet laureate for his full two-year term, and attorneys' fees. *Id.* (prayer for relief).

2. The district court dismissed the complaint. The court held that Baraka's claims against the State of New Jersey and the Arts Council were barred by the Eleventh Amendment. Pet. App. 50a. It dismissed his claim against Governor McGreevey and Harrington challenging the elimination of his position as

poet laureate on the ground that they were entitled to absolute legislative immunity, *id.* at 50a-54a, and his claims relating to the withholding of his $10,000 honorarium because the legislature had not appropriated the funds for disbursement. *Id.* at 55a-57a. The court rejected Baraka's request for injunctive relief because it believed that "[i]n order to reinstate Plaintiff to the position of Poet Laureate, this Court must order the Legislature to rescind their votes repealing Section 52:16A-26.9 . . . *and* enact legislation recreating the position of Poet Laureate." *Id.* at 54a. The court declined to exercise supplemental jurisdiction over Baraka's state-law claims. *Id.* at 57a.

3.a. In a 2-1 decision, the court of appeals affirmed. The Third Circuit majority ruled that Governor McGreevey's and Harrington's actions were "legislative" and, therefore, that these officials were entitled to absolute legislative immunity. Pet. App. 7a. The court perceived the "gravamen" of Baraka's complaint to be that Governor McGreevey and Harrington "orchestrated and directed" the New Jersey legislature to abolish the position of Poet Laureate. These actions, the court stated, were "an integral part of the deliberative and communicative processes . . . by which the repealer was enacted" and fell "squarely 'within the sphere of legitimate, legislative activity.'" *Id.* at 9a (citations omitted). And although Baraka had specifically declined to base his claims on Governor McGreevey's action in signing the bill into law, the majority maintained that Baraka's cause of action "also necessarily encompasses the Governor's actions in signing the repealer into law." *Id.* at 10a. As for Harrington, the majority explained that "[a]s the Governor's appointee, Harrington's actions in advising and counseling Governor McGreevey and the Legislature are also legislative." *Id.*

The court rejected Baraka's contention that respondents' actions were administrative, not legislative. Under Third Circuit precedent, the court acknowledged, an activity must be

"both substantively and procedurally legislative in nature" to merit legislative immunity. *Id.* at 11a (citations omitted). The majority believed, however, that the respondent's actions in recommending and, in the Governor's case, signing, the repealer were similar to those of the defendants in *Bogan v. Scott-Harris,* 523 U.S. 44 (1998), and thus qualified as procedurally legislative. Pet. App. 9a-11a, 14a. The majority also reasoned that the officials' actions were substantively legislative because the law eliminated the position of poet laureate, which "constitutes the type of 'policy-making' that traditional legislation entails." *Id.* at 15a. The court ruled that *Bogan*'s rejection of inquiries into legislators' subjective motives foreclosed Baraka's argument that the actual purpose of the repealer was to remove him specifically as poet laureate. *Id.* at 15a-17a.

The Third Circuit held that legislative immunity barred not only Baraka's claims against Governor McGreevey and Harrington in their individual capacities, but also his claim for injunctive relief against them in their *official* capacities. *Id.* at 19a-21a. The court rejected Baraka's argument that legislative immunity is a personal immunity defense and relied on an earlier Third Circuit case that had interpreted *Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719 (1980), to hold that in "appropriate cases," "legislative immunity can apply to claims for declaratory and injunctive relief against officials in their official capacities." *Id.* at 20a (citing *Larsen v. Senate of Commonwealth of Pa.,* 152 F.3d 240, 253 (3d Cir. 1998)). According to the court of appeals, the reinstatement remedy sought by Baraka "would infringe on the role of the New Jersey Legislature" by "seek[ing] to require New Jersey legislators to rescind their votes repealing the

statute and to enact legislation recreating the position." *Id.* at 21a.[5]

b. Judge Nygaard dissented. Pet. App. 36a-43a. In his view, "the majority holding expands the legislative immunity privilege to insulate almost every action taken by executive branch officials having some connection, however remote, with the passage of legislative acts, subsumes in part the qualified immunity doctrine, and effectively abolishes accepted causes of action against executive branch officials who meddle in the affairs of, or otherwise insinuate themselves into, the legislative process." *Id.* at 36a. Legislative immunity, the dissent contended, is limited to activities that constitute "integral steps in the legislative process," *id.* at 41a, and does not extend to "practices that merely *relate* to legislative activities." *Id.* at 40a-41a. "[A]ctivities such as 'orchestrat[ing] and direct[ing]' the New Jersey legislature into passing a personally targeted piece of legislation—be they undertaken by a governor or ordinary citizen—are activities which may be casually and incidentally related to legislative affairs, but are not part of the legislative process itself." *Id.* at 40a.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision Granting Respondents Absolute Legislative Immunity Is Contrary to this Court's Precedents and Creates a Conflict Among the Circuits on an Important Question of Federal Law.

In *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980), and *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998), this Court held that

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[5] The Third Circuit also affirmed the dismissal of Baraka's claim for the honorarium and his claim that the defendants denied him constitutionally protected property and liberty interests without due process and its refusal to exercise supplemental jurisdiction over his state-law claims. Pet. App. 21a-34a. These rulings are not at issue here.

officials outside the legislative branch may be entitled to legislative immunity, but only when they perform legislative functions. In *Consumers Union,* the Court held that the Virginia Supreme Court and its chief justice were absolutely immune from suit for issuing or failing to amend the Virginia State Bar Code because propounding the Code was an act of rulemaking. In *Bogan,* the Court held a mayor entitled to absolute legislative immunity for introducing a budget and signing into law an ordinance enacting it. Both cases involved challenges to actions that were formal steps in the legislative or rulemaking process.

The Third Circuit's decision that Governor McGreevey and Harrington were entitled to absolute legislative immunity because their acts, as alleged in the complaint, likewise were integral to the legislative process, is not only contrary to this Court's precedents, but creates a conflict among the circuits. Other courts of appeals, consistent with this Court's cases, have generally extended absolute legislative immunity to executive officials only when they have performed formally legislative functions, such as introducing budgets, signing bills into law, and vetoing bills—not for acts that are merely *related to* the legislative process. Moreover, other circuits have refused to find activities to be substantively legislative when, as here, they target a particular individual for differential treatment.

A. The Third Circuit's Decision is Contrary to this Court's Precedents on Legislative Immunity.

As Judge Nygaard emphasized in his dissenting opinion, the Speech and Debate Clause, which this Court has generally equated with the legislative immunity accorded state legislators under § 1983, *see Consumers Union,* 446 U.S. at 733, "was intended to preserve the independence and integrity of the Legislature *from* the Executive." Pet. App. 37a. And while "the courts have extended the privilege to matters beyond pure speech or debate in either House," they have done so "only

when necessary to prevent indirect impairment of such deliberations." *Id.* at 38a (quoting *Gravel v. United States,* 408 U.S. 606, 625 (1972)). This Court has found it neither "sound [n]or wise . . . to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *United States v. Brewster,* 408 U.S. 501, 516 (1972). Because "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process," *id.* at 517; *accord Hutchinson v. Proxmire,* 443 U.S. 111, 127 (1979), legislative immunity "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster,* 408 U.S. at 528.

Accordingly, this Court has extended legislative immunity to such formal acts as voting for a resolution, *Powell v. McCormack,* 395 U.S. 486, 504-06 (1969); issuing subpoenas for a committee hearing, *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 507 (1975), and *Dombrowski v. Eastland,* 387 U.S. 82, 84-85 (1967); preparing committee investigative reports, *Doe v. McMillan,* 412 U.S. 306, 312-13 (1973); addressing a legislative committee, *Gravel,* 408 U.S. at 616; engaging in rulemaking, *Consumers Union,* 446 U.S. at 731-34; and, of course, making a speech before the legislative body, *United States v. Johnson,* 383 U.S. 169, 184-85 (1966). Taking a "functional" approach to immunity questions, *Forrester v. White,* 484 U.S. 219, 224 (1988), the Court has recognized that executive officials also enjoy absolute legislative immunity for their legislative acts. Thus, the Court extended legislative immunity to Mayor Bogan for his formal legislative acts of introducing and signing legislation into law, 523 U.S. at 55, and has recognized that the President and state governors act legislatively when signing or vetoing bills. *See Edwards v. United States,* 286 U.S. 482, 490 (1932); *Smiley v. Holm,* 285 U.S. 355, 372-73 (1932).

The circuits have followed suit by conferring legislative immunity on executive officials who have undertaken similar formal legislative actions, such as introducing budgets, voting on bills (more typical at the local level), and signing and vetoing bills.[6] The Seventh Circuit, for example, has applied a highly formal analysis, extending legislative immunity to a government official only when he is "acting in his 'legislative capacity.'" *Hansen v. Bennett*, 948 F.2d 397, 401 (7th Cir. 1991) (citation omitted). In the Seventh Circuit's view, this Court "has construed the legislative capacity narrowly, holding that legislative immunity 'does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not *a part of the legislative process itself*.'" *Id.* at 402 (quoting *United States v. Brewster*, 408 U.S. 501, 528 (1972)). In denying the mayor legislative immunity in *Hansen*, the court emphasized that legislative immunity has been granted for such formal actions as voting on a resolution, speaking on legislation or in a legislative hearing, or subpoenaing records for use in a legislative hearing, *id.*, actions in which the mayor had not engaged. *Id.* at 402-03; *see also De la Biblia Abierta v. Banks*, 129 F.3d 899, 904 (7th Cir. 1997) (focusing on acts that are "elements of the core legislative

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[6] *See, e.g., Torres-Rivera v. Calderón-Serra*, 412 F.3d 205, 212-14 (1st Cir. 2005) (governor entitled to legislative immunity for signing legislation into law); *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 808 (7th Cir. 2003) (county executive entitled to legislative immunity for transmitting budget to County Board); *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (governor has legislative immunity for signing bill into law); *Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 5 (1st Cir. 2000) (mayor entitled to absolute immunity for signing ordinance into law); *Bryan v. City of Madison*, 213 F.3d 267, 272, 274 (5th Cir. 2000) (mayor entitled to legislative immunity for vote with board of aldermen to rezone property); *Compton Police Officers Ass'n v. City of Compton*, 55 Fed. Appx. 482, 482 (9th Cir. 2003) (mayor entitled to legislative immunity for vote to disband police department); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. Unit A May 1981) (mayor entitled to legislative immunity for veto of ordinance).

process"); *see also Kamplain v. Curry County Bd. of Comm'rs*, 159 F.3d 1248, 1251-52 (10th Cir. 1998) (citing the Seventh Circuit's narrow formal approach). Under this formal approach, McGreevey and Harrington would be denied legislative immunity.

Counsel for petitioner is unaware of any court of appeals decision (at least since *Scheuer v. Rhodes*, 416 U.S. 232 (1974) announced that executive officers are generally entitled to qualified, not absolute, immunity) that has done what the Third Circuit did here—grant a governor legislative immunity for an action other than signing or vetoing legislation. What the Court said in *Brewster* remains true today: "In every case thus far before this Court, [legislative immunity] has been limited to an act which was clearly a part of the legislative process," 408 U.S. at 515-16; *see also Gravel*, 408 U.S. at 626 ("part and parcel of the legislative process"), or, as the Court put it in *Bogan*, an act that constituted an "integral step[] in the legislative process." 523 U.S. at 55.

Where the Third Circuit has departed from this Court's cases and the approach of other circuits and where guidance from this Court is needed is on the question whether executive officers are entitled to absolute legislative immunity for actions that are related to the legislative process but are not formal, integral steps in that process. As the dissent below explained, the majority "ignore[d] the question of whether McGreevey's and Harrington's actions [were] 'integral steps in the legislative process,' focusing instead on whether their actions were undertaken within the 'sphere of legislative activity.'" Pet. App. 41a, n.21.

Here, the court of appeals majority transmuted Governor McGreevey's *political* action of instituting a concerted campaign to oust Baraka from his post into an integral step in the legislative process by pointing to the New Jersey Constitution, which gives the Governor authority to

"recommend such measures as he may deem desirable" to the legislature. *Id.* at 10a, 19a (citing N.J. Const. art. V, § 1). But the court of appeals overlooked that the New Jersey Constitution envisions a formal procedure by which the governor recommends measures to the legislature:

> The Governor shall communicate to the Legislature, by message at the opening of each regular session and at such other times as he may deem necessary, the condition of the State, *and shall in like manner* recommend such measures as he may deem desirable. He may convene the Legislature, or the Senate alone, whenever in his opinion the public interest shall require.

N.J. Const. art. V, § 1, ¶ 12 (emphasis added). The complaint does not allege that the governor carried out his campaign through such a formal message, and in fact, no such formal message from the Governor to the legislature was delivered.

Ultimately, the majority's view that respondents' alleged actions were procedurally legislative boils down to nothing more than the notion that they communicated their views to legislators, leading the dissenting judge to respond that he "would not take garden variety lobbying activity, even if undertaken by a state governor and his representative, and place such activity under the absolute protection of the privilege." Pet. App. 40a (Nygaard, J., dissenting). The Third Circuit majority did not even attempt to identify a formal legislative role for Harrington, but simply asserted that, as the governor's appointee, her actions "in advising and counseling Governor McGreevey and the Legislature are also legislative." *Id.* at 10a. Judge Nygaard was right to protest that "activities such as 'orchestrat[ing] and direct[ing]' the New Jersey legislature into passing a personally targeted piece of legislation . . . are activities which may be casually and incidentally related to

legislative affairs, but are not part of the legislative process itself." *Id.* at 40a.

By granting absolute immunity to every action undertaken within the "sphere of legitimate legislative activity," *id.* at 7a-8a, 9a, 13a & n.8, 18a; *see also id.* at 41a, n.21 (Nygaard, J., dissenting), the Third Circuit has run afoul of the care this Court has taken "not to extend the scope of the protection further than its purposes require." *Forrester,* 484 U.S. at 224. Qualified immunity, the norm for executive officials, *see Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982), is sufficient to protect McGreevey and Harrington, Pet. App. 43a (Nygaard, J., dissenting), if, after Baraka has been given the opportunity to engage in discovery, it turns out that their conduct merits it.

B. The Third Circuit's Decision Conflicts with Decisions of Other Circuits Regarding the Test That Governs Whether an Act Is Substantively Legislative for Legislative Immunity Purposes.

This case presents a related question: whether, in the wake of *Bogan*, which reserved judgment on the issue, 523 U.S. at 55, an activity, in addition to being formally, or procedurally, legislative, must be "substantively" legislative to cloak its participants with legislative immunity, and, if so, what test applies in evaluating whether an act bears "all the hallmarks of traditional legislation." *Id.*[7] If the New Jersey legislature's elimination of the poet laureate position was not a substantively legislative act, then it follows that respondents' actions directing and orchestrating that act likewise were not substantively legislative. The circuits disagree regarding the appropriate test.

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[7] Despite reserving judgment in *Bogan,* the Court has previously suggested that whether actions are legislative "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *See INS v. Chadha,* 462 U.S. 919, 952 (1983).

Several circuits, including the Third, impose some sort of requirement that an act be substantively, in addition to procedurally, legislative to qualify for absolute immunity, but the tests used by the circuits differ markedly and in a way that would have been dispositive here.

The Third Circuit maintained that McGreevey's and Harrington's actions leading up to the repeal of the statute were "substantively legislative." Pet. App. 15a. In the majority's view, "[e]liminating the position of poet laureate constitutes the type of 'policy-making' that traditional legislation entails." *Id.* The majority analyzed the issue only superficially. In deciding whether the repeal amounted to traditional legislation, the court of appeals looked only to the face of the statute without considering the act's purpose, its legislative history, legislative statements accompanying its passage, whether the statute reflected policy-making and line-drawing as opposed to an administrative action directed at an individual, or whether the statute singled out a particular individual for differential treatment. The Second Circuit's analysis is similar. *See State Employees Bargaining Agent Coalition v. Rowland,* --- F.3d ---, 2007 WL 1976148, at *13, *15 (2d Cir. July 10, 2007). The Tenth Circuit appears to agree with the Third Circuit that the number of persons affected should play no role in the analysis. *Kamplain,* 159 F.3d at 1251.[8]

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[8] In earlier cases, the Third Circuit considered important whether a decision affected a small number or a single individual, in which case it was administrative, *see, e.g., Ryan v. Burlington County,* 889 F.2d 1286, 1291 (3d Cir. 1989), but the court has since retreated from emphasizing this factor. *See Acierno v. Cloutier,* 40 F.3d 597, 610-13 (3d Cir. 1994). Although here the Third Circuit quoted language from its earlier decision in *Gallas v. Supreme Court of Pennsylvania,* 211 F.3d 760, 774 (3d Cir. 2000) (quoting *Ryan,* 889 F.2d at 1291), that "[w]here the decision affects a small number or a single individual, the legislative power is not implicated," Pet. App. 12a, the court ultimately gave that consideration no weight.

Other circuits employ a broader, more probing inquiry in assessing whether an act is substantively legislative. The First Circuit's two-part analysis, announced in *Cutting v. Muzzey,* 724 F.2d 259 (1st Cir. 1984), for determining whether an action is legislative or administrative represents one of the primary alternative approaches. "First, if the facts underlying the decision are 'generalizations concerning a policy or state of affairs,' the decision is legislative. If the decision stems from specific facts relating to particular individuals or situations, the act is administrative." *Acevedo-Garcia v. Vera-Monroig,* 204 F.3d 1, 9 (1st Cir. 2000) (quoting *Cutting,* 724 F.2d at 261). "Second, the court must consider the 'particularity of the impact of the state of action.' 'If the action involves establishment of a general policy, it is legislative; if it 'single[s] out specifiable individuals and affect[s] them differently from others,' it is administrative." *Id.*

Accordingly, in *Acevedo-Garcia,* the First Circuit held that a Puerto Rican mayor was not entitled to legislative immunity for implementing a layoff plan in a politically partisan manner even though the legislature subsequently ratified the mayor's actions. The First Circuit held that although legislation provided a framework for the decisions of the mayor, his acts of political discrimination were not "prospective"—that is, they did not "reach well beyond the particular occupant of the office"—but instead, targeted specific individuals affiliated with the party out of power. *Id.* at 8-9; *see also Haskell v. Washington Township,* 864 F.2d 1266, 1278 (6th Cir. 1988) (if "the action 'single[s] out specifiable individuals and affect[s] them differently from others,' it is administrative") (quoting *Cutting,* 724 F.2d at 261).

The Fifth Circuit also has applied the First Circuit's two-part test, holding that seemingly formal acts—the mayor's vetoes of zoning determinations—were not substantively legislative because the actions vetoed by the mayor did not involve a "determination of a policy" but were "based on

specific, particular facts" that affected plaintiff's development alone. *Bryan v. City of Madison,* 213 F.3d 267, 273 (5th Cir. 2000). Of various challenged actions, the Fifth Circuit found that only the mayor's vote to rezone the property—a decision that was general, prospective, and affected the entire community—deserved legislative immunity. *Id.* at 273-74; *see also Hughes v. Tarrant County,* 948 F.2d 918, 921 (5th Cir. 1991) (applying the First Circuit test).

The Fourth Circuit, too, has relied on the First Circuit analysis to hold that the elimination of the salary of the Clerk to the Board of Commissioners was administrative because the commissioners "were not engaged in the process of adopting prospective, legislative-type rules" and the underlying facts and impact were "specific, rather than general, in nature." *Alexander v. Holden,* 66 F.3d 62, 67 (4th Cir. 1995). Similarly, the Ninth Circuit has announced a test taking a hard look at the substance of activities before determining that they are legislative, considering four factors: (1) whether the act involves ad hoc decisionmaking or the formulation of policy; (2) whether the act applies to a few individuals or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation. *Kaahumanu v. County of Maui,* 315 F.3d 1215, 1220 (9th Cir. 2003); *see also Bechard v. Rappold,* 287 F.3d 827, 829 (9th Cir. 2002).

The Third Circuit's approach in determining whether the repeal of Baraka's position was a legislative or an administrative act differs from that of other circuits not only in its analysis of what constitutes "substantively" legislative action, but in its unwillingness to look beyond the text of the statute to determine the true "nature of the act." *Bogan,* 523 U.S. at 54. The court of appeals rejected Baraka's claim that the purpose of eliminating the position was to remove *him* specifically as poet laureate, Pet. App. 15a-17a, reasoning that *Bogan* prohibited reliance on defendants' "subjective intent in

resolving the logically prior question of whether their acts are legislative." *Id.* at 16a (quoting *Bogan*, 523 U.S. at 54). The court of appeals missed Baraka's point. Evaluating whether an enactment's *purpose* or *character* is legislative or administrative is not the same as inquiring into individual officials' subjective intent or motives. Petitioner submits that it was the latter, and not the former, that concerned this Court in *Bogan*. Suppose the statute contained a preamble stating: "Because the legislature of New Jersey has concluded that Amiri Baraka should no longer hold the position of poet laureate, we hereby abolish that position." Even though the action taken would still be the repeal of a position, it is difficult to envision a majority of circuits holding that such an act would be substantively legislative, rather than administrative action.

What actually occurred here is little different from the hypothetical, except that the legislative purpose was expressed in official statements accompanying the various bills proposed to remove Mr. Baraka from his position (including in the bill that became law) and during the legislative debates on the bill, as well as by the Governor. *See supra* pages 3-7. The Third Circuit, however, looked no further than the fact that the statute eliminated his position, ignoring the fact that the repealer, by taking effect during Baraka's tenure, singled him out for disciplinary action—as was the act's purpose. By contrast, in evaluating whether an act is legislative or administrative, other circuits, such as the Sixth and Ninth, look to legislative deliberations and history to aid in evaluating the nature or purpose of the challenged act. *See, e.g., Canary v. Osborn*, 211 F.3d 324, 330 (6th Cir. 2000) ("[T]he minutes indicate that the Board went into executive session for the specific purpose of 'discuss[ing] the employment of public employees.' Moreover, the circumstances of the one-hour executive session . . . suggest that the Board was making personalized assessments of individual employees, not engaging in an impersonal budgetary analysis of various positions."); *Bechard*, 287 F.3d at 828-32

(evaluating proceedings before county commissioners to determine that their termination of plaintiff and his position involved ad hoc decisionmaking initially affecting only plaintiff, rather than the formulation of policy).

Thus, under various approaches applied by the First, Fourth, Fifth, Sixth, and Ninth Circuits, Governor McGreevey and Harrington likely would have been denied legislative immunity on substantive (as well as procedural) grounds. Their actions and the statute passed by the New Jersey legislature would not qualify as substantively legislative under the tests discussed above because they represented an ad hoc decision, not the formulation of policy; applied not only prospectively to would-be poet laureates, but singled out *one* individual, the then-current poet laureate Amiri Baraka, to treat him differently from others by stripping him of his position and his honorarium in the middle of his term; and were based on specific facts relating to one individual and one particular situation. The choice of the proper test would have made all the difference in Baraka's case, and this Court should grant review to determine the appropriate analysis.

II. The Third Circuit's Decision That Legislative Immunity Bars Petitioner's Claim for Prospective Injunctive Relief Against Respondents in Their Official Capacities Deepens a Conflict in the Circuits and Is Contrary to this Court's Precedents.

The Third Circuit held that the doctrine of legislative immunity barred even Baraka's claim for prospective injunctive relief against Governor McGreevey and Harrington (or, now, against their successors) in their *official* capacities. Pet. App. 19a-21a. That ruling flies in the face of this Court's precedents and deepens an already existing conflict in the circuits, with the Third and Eleventh Circuits—and, as of last week, the Second Circuit—arrayed against several other circuits, regarding whether a personal immunity, such as absolute legislative

immunity, can *ever* bar a claim for prospective injunctive relief against state officials in their official capacities.

The Third Circuit held that in "appropriate cases," legislative immunity can apply to claims for declaratory and injunctive relief against officials in their official capacities. *Id.* at 20a; *accord Larsen v. Senate of Commonwealth of Pa.*, 152 F.3d 240, 252-54 (3d Cir. 1998). The Eleventh Circuit agrees. *See Scott v. Taylor*, 405 F.3d 1251, 1254-57 (11th Cir. 2005) (officials entitled to legislative immunity in their individual capacities also immune from suit seeking prospective injunctive relief against them in their official capacities). And last week, relying in part on the Third and Eleventh Circuits' decisions, the Second Circuit joined their side of the circuit split. *See Rowland*, 2007 WL 1976148, at *1, *6-*11 (claims for injunctive relief against state officials sued in their official capacities may be barred by legislative immunity).[9]

The Second, Third, and Eleventh Circuits' rulings that absolute legislative immunity *can* block an official-capacity suit for prospective injunctive relief have sweeping ramifications by potentially stripping individuals targeted by

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[9] In previous cases involving legislative immunity, the Second Circuit had held that "[i]mmunity, either absolute or qualified, is a *personal* defense that is available only when officials are sued in their individual capacities." *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007); *accord Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 73 (2d Cir. 1992). In *Rowland*, the Second Circuit attempted to reconcile these cases with its new holding that legislative immunity can bar a suit seeking injunctive relief from an official in his official capacity by distinguishing the earlier cases as involving official-capacity claims against local-level officials rather than state officials. The Second Circuit maintained that this Court has never held that personal immunities from suit are unavailable to *state* officials sued in their official capacities. *Rowland*, 2007 WL 1976148, at *9. The Eleventh Circuit likewise distinguished between official-capacity claims against local officials and official-capacity claims against state officials. *Scott*, 405 F.3d at 1254-57 & n.6.

"legislative" actions of the right to secure any judicial remedy against the enforcement of an unconstitutional action or statute. The Court's landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), and its progeny were designed to avoid just such a result. *See, e.g., Sterling v. Constantin*, 287 U.S. 378, 393 (1932) (holding that a governor "is in no different position from that of other state officials" in that, under *Ex parte Young*, "where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief"); *see also Kilbourn v. Thompson*, 103 U.S. 168 (1881) (Kilbourn entitled to bring false imprisonment claim against the House Sergeant at Arms who executed the warrant the House voted on to authorize his arrest); *accord Powell*, 395 U.S. at 503-05; *cf. Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (Presidential immunity does not "in any way suggest[] that Presidential action is *unreviewable*. . . . Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.").

In contrast to the Second, Third, and Eleventh Circuits, the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have held that personal immunities (such as legislative immunity) are available *only* to officials sued in their individual, not their official, capacities. *See, e.g., Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000) ("[A] § 1983 suit naming defendants only in their 'official capacity' does not involve personal liability to the individual defendant[; thus,] defenses such as absolute quasi-judicial immunity . . . are unavailable in official-capacity suits.");[10] *Denton v.*

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[10] *See also Burge v. Parish of St. Tammany*, 187 F.3d 452, 466-68 (5th Cir. 1999) (official-capacity suit against District Attorney not barred by prosecutorial immunity); *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d

Bedinghaus, 40 Fed. Appx. 974, 979 (6th Cir. 2002) (defendants sued in their official capacities not shielded by immunity defenses applicable to individual capacity suits); *Redwood Village Partnership v. Graham*, 26 F.3d 839, 842 (8th Cir. 1994) (state officials' absolute immunity for rulemaking did not bar declaratory and injunctive relief to challenge the regulations); *Hogan v. Von Raab*, 959 F.2d 240, 1992 WL 61893, at *2 n.2 (9th Cir. Mar. 31, 1992) (Table) (qualified immunity does not apply to official-capacity suits seeking declaratory and injunctive relief); *Akins v. Board of Governors*, 840 F.2d 1371, 1377-78 (7th Cir.) (an action for prospective injunctive relief against a state official is brought properly in his official capacity; qualified immunity applies only to suits for damages), *vacated and remanded on other grounds*, 488 U.S. 920 (1988); *see also Supreme Video, Inc. v. Schauz*, 15 F.3d 1435, 1442-43 (7th Cir. 1994) (qualified immunity not a defense in official-capacity suits seeking declaratory relief).

The decisions of the Second, Third, and Eleventh Circuits have left this area of the law in a profound state of uncertainty. As one district court observed, even before the Second and Third Circuit rulings added to the confusion: Although "[t]here has been a strong indication" that in § 1983 actions, "legislative immunity is not applicable to official capacity claims," "the current state of the law on legislative immunity" still leaves unanswered whether "if an action is a legislative activity," legislative immunity is "available to protect the defendant in only their official capacity or in only their individual capacity or in both capacities or in neither capacity." *Parker v. Laurel County Detention Ctr.*, No. Civ.A. 605-113-DCR, 2005 WL 1917149, at *3 (E.D. Ky. Aug. 9, 2005) (citing *Scott v. Taylor*,

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129, 134 (5th Cir. 1986) (official immunity doctrines do not "bar injunctive relief or suits in which officials are sued only in their official capacities and, therefore, cannot be held personally liable") (footnotes omitted).

405 F.3d 1251, 1256 (11th Cir. 2005)). The Second Circuit forthrightly recognized that "there is arguably conflicting case law on whether legislative immunity applies at all to claims for injunctive relief brought against state officials in their official capacities." *Rowland,* 2007 WL 1976148, at *6.

The circuits that have rejected personal immunity defenses to official capacity suits for injunctive relief against the implementation of unlawful legislative actions have, unlike the Second, Third, and Eleventh Circuits, been faithful to this Court's precedents. In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.,* 446 U.S. 719 (1980), this Court held that the Virginia Supreme Court and its chief justice enjoyed absolute legislative immunity from damages, declaratory, and injunctive relief for either issuing or refusing to amend the Bar Code to eliminate its unconstitutional provisions. *Id.* at 731-34. At the same time, however, the Court recognized that the Virginia court and its chief justice were not immune from a suit to enjoin them from *enforcing* the rules, but were "proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.* at 736. The Court specifically noted that "prospective relief was properly awarded against the chief justice in his official capacity." *Id.* at 737 n.16.

In *Kentucky v. Graham,* 473 U.S. 159 (1985), the Court elaborated on the distinction between personal- and official-capacity suits and the defenses available in each. The Court explained: "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* at 165 (citing *Monell v. Dep't of Social Servs. of New York,* 436 U.S. 658, 690, n.55 (1978)). "[A]n official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses . . . ." *Id.* at 166-67. "*In an*

official-capacity action, these defenses are unavailable. The *only* immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167 (emphasis added; citations omitted)[11]; *accord Hafer v. Melo,* 502 U.S. 21, 25 (1991); *see also Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 677 n.* (1996) ("Because only claims against the Board members in their *official* capacities are before us, and because immunity from suit under § 1983 extends to public servants only in their *individual* capacities," "the legislative immunity claim is moot"). The Second Circuit acknowledged that its ruling was in tension with "arguably contradictory *dicta* in *Graham* and *Umbehr*." *Rowland,* 2007 WL 1976148, at *11; *see also id.* at 8.

In ruling that Baraka's claim for injunctive relief against respondents in their official capacities was barred by legislative immunity, the Third Circuit relied heavily on its earlier ruling in *Larsen,* 152 F.3d at 253, which had held that the legislative immunity enjoyed by state legislators for impeaching and removing from office a Pennsylvania Supreme Court Justice also barred a claim for prospective injunctive relief against the legislators in their official capacities. Pet. App. 20a-21a. In *Larsen,* the court sought to reconcile its holding with this Court's precedents by pointing to the Court's ruling in

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[11] The Court in *Graham* also reaffirmed that, under the *Ex parte Young* doctrine, a governmental entity's Eleventh Amendment immunity does not bar an official-capacity action for injunctive relief against a state officer. *Id.* at 167 n.14; *see also Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 & n.10 (1989). As the Second Circuit recognized, every circuit to have considered the issue has held that claims for reinstatement are appropriate subjects for *Ex parte Young* actions. *Rowland,* 2007 WL 1976148, at *19; *see, e.g., Meiners v. University of Kansas,* 359 F.3d 1222, 1232-33 (10th Cir. 2004); *Carten v. Kent State Univ.,* 282 F.3d 391, 396 (6th Cir. 2002); *Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 939-42 (9th Cir. 1997); *Coakley v. Welch,* 877 F.2d 304, 306-07 (4th Cir. 1989); *Elliott v. Hinds,* 786 F.2d 298, 301-02 (7th Cir. 1986).

Consumers Union that legislative immunity barred prospective injunctive relief against the Virginia court and its chief justice for actions taken in their legislative capacity, *see* 152 F.3d at 252-53—such as an order compelling them to amend the Bar Code. *See Consumers Union*, 446 U.S. at 731-34. Even assuming that efforts to compel legislators to enact particular legislation may fall within an exception to the general rule that legislative immunity does not bar prospective injunctive relief in an official-capacity action, the Third Circuit badly erred in failing to appreciate the difference between a lawsuit seeking to compel a legislator to cast or rescind a vote and an action against an appropriate official seeking injunctive or declaratory relief to prevent the *enforcement* of (or to redress the consequences of) an unconstitutional action, statute, or regulation. *See Graham*, 473 U.S. at 164 n.8 (reaffirming *Consumers Union*'s holding that the Virginia chief justice in his official capacity could be enjoined from enforcing the Bar Code); *Consumers Union*, 446 U.S. at 736-37 & n.16. Here, analogizing to its ruling in *Larsen*, the Third Circuit asserted that the relief sought by Baraka would "require New Jersey legislators to rescind their votes repealing the statute and to enact legislation recreating the position." Pet. App. 21a.[12]

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[12] The possibility that *Consumers Union* supports an exception to the general rule that legislative immunity does not bar prospective injunctive relief in an official-capacity action is undermined by the Court's flat statements in later cases, including *Graham*, *Hafer*, and *Umbehr*, that personal immunities do not apply in official-capacity suits. Limitations on a federal court's power to compel legislators to cast particular votes more likely stem from general separation-of-powers principles and appropriate limits on injunctive relief, as well as from the fact that, in most cases, legislators are not proper defendants in an *Ex parte Young* action because they play no role in enforcing the legislation they enact. *See Ex parte Young*, 209 U.S. at 157; *see, e.g.*, *Scott*, 405 F.3d at 1254 n.3, 1256 n.8 (noting that legislator defendants had no role in implementing the challenged redistricting). If no state official with the appropriate enforcement authority is named in a lawsuit, the action is barred *not* by a personal immunity, but instead by Eleventh Amendment immunity because it is effectively an action

By that strange logic, many lawsuits seeking prospective injunctive relief from state officials under *Ex parte Young* to enjoin the enforcement of unconstitutional legislative actions would fail on legislative immunity grounds on the theory that legislators would have to rescind their votes or cast new ones. But effective relief against an executive officer to redress a constitutional violation can be devised without enjoining legislators to recast their votes, and Baraka never sought an injunction ordering New Jersey legislators to re-vote. The court's assumption that the only way to afford Baraka relief would be to order the legislature to vote again, instead of simply ordering McGreevey and Harrington, state officials with enforcement authority over the poet laureate position, to reinstate him to his position as poet laureate, is refuted by *Spallone v. United States*, 493 U.S. 265 (1990). There, this Court held that there was no need for a district court to impose contempt sanctions against individual city council members for failing to adopt an ordinance as required by a consent decree when it had the power to impose contempt sanctions against the city itself. *Id.* at 278-80. Similarly, here, Baraka neither needed nor sought relief against individual legislators to redress his injuries.

In light of the deep circuit split regarding whether prospective injunctive relief against a state official sued in his official capacity may be barred by the official's legislative immunity and the inconsistency of the Third Circuit's ruling on that issue with this Court's precedents, the Court should grant certiorari to address the second question presented.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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against the state to which the *Ex parte Young* doctrine is inapplicable.

Respectfully submitted,

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July 2007

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2361

AMIRI BARAKA,
Appellant

v.

JAMES E. McGREEVEY, individually;
*RICHARD J. CODEY, in his official capacity
as Acting Governor of the State of New Jersey;
STATE OF NEW JERSEY, a body corporate and politic;
NEW JERSEY STATE COUNCIL OF THE ARTS,
an agency and a body politic of the State of New Jersey;
SHARON HARRINGTON, individually and in her
official capacity as Chairperson of the
New Jersey State Council on the Arts;
JOHN DOES 1-10; MARY DOES 1-10;
UNKNOWN AGENCIES and
GOVERNMENT ENTITIES 1-10, unknown to plaintiff
at this time, individually and in their official capacities

*(Pursuant to Rule 43(c), F.R.A.P.)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 04-cv-1959
(Honorable Garrett E. Brown, Jr.)

Argued April 24, 2006
Before: SCIRICA, *Chief Judge*,
NYGAARD, *Circuit Judge*, and YOHN, *District Judge*[*]

(Filed March 21, 2007)

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[*] The Honorable William H. Yohn Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

SCIRICA, *Chief Judge.*

This appeal arises from an action brought by Amiri Baraka under 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 2201 against officials, employees, and entities of the State of New Jersey. Baraka alleges defendants violated his constitutional rights by eliminating his position as poet laureate of New Jersey. The District Court dismissed Baraka's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. We will affirm.

I.

Amiri Baraka, a poet, was appointed poet laureate of New Jersey in July 2002, by Governor James McGreevey, on the recommendation of the New Jersey State Council for the Arts. The New Jersey State Legislature created the position of poet laureate in 1999 when it enacted P.L.1999, c.228 (codified at N.J. Stat. Ann. § 52:16A-26.9 (repealed 2003)).[1] The statute

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[1] Section 52:16A-26.9, provided:

a. There is hereby established the New Jersey William Carlos Williams Citation of Merit to be presented to a distinguished poet from New Jersey who shall be considered the poet laureate of the State of New Jersey for a period of two years. The poet laureate shall receive an honorarium of $10,000.

b. The New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts, shall biennially appoint and convene a panel of four persons who are either distinguished poets or persons who represent a range of stylistic approaches in

provided the governor would biennially appoint a State poet laureate who would serve for two years and receive an honorarium of $10,000. The poet laureate would promote poetry within the State and give at least two public readings each year. *Id.*

Two months after his appointment, Baraka read his poem entitled "Somebody Blew Up America" at the Geraldine R. Dodge Poetry Festival in Stanhope, New Jersey. The poem commented generally on American society and politics, and on terrorism, specifically referencing the terror attacks of September 11, 2001, and read, in part: "Who knew the World Trade Center was gonna get bombed/Who told 4000 Israeli workers at the Twin Towers to stay home that day/Why did Sharon stay away?"[2]

After an outcry, a spokesman for Governor McGreevey issued a statement that "[t]he governor strictly criticizes any

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the field of poetry. Each member of the first such panel shall be from New Jersey. After the term of the first poet laureate and each subsequent poet laureate has expired, that person shall serve as one of the members of the panel for a period of two years and participate in the selection of the next poet laureate. The panel shall submit to the Governor the name of the poet to whom the citation of merit shall be presented and who shall be considered poet laureate of the State for the subsequent two years.

c. The Governor shall present biennially the New Jersey William Carlos Williams Citation of Merit.

d. The poet laureate shall engage in activities to promote and encourage poetry within the State and shall give no fewer than two public readings within the State each year while the poet holds the laureate designation.

e. The New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts, shall establish such guidelines as are deemed necessary to effectuate the purposes of this section.

[2] The full text of the poem is available at a Web page registered to Baraka, http://www.amiribaraka.com/blew.html (last visited on March 15, 2007).

racist or anti-Semite behavior. The style of Baraka's recent verse implies that Israelis had known about the September 11 terrorism attacks." (Second Am. Compl. ¶ 15.) Governor McGreevey asked Baraka to resign. Baraka refused, contending the poem was neither anti-Semitic nor racist.

Baraka alleges Governor McGreevey then instructed Sharon Harrington, the chair of the New Jersey State Council for the Arts, to withhold payment of the $10,000 honorarium. Baraka also alleges Governor McGreevey and other defendants "commenced a concerted campaign" to remove him from his position or to abolish the position of poet laureate altogether. Soon thereafter, the New Jersey State Legislature passed P.L. 2003, c. 123, which repealed section 52:16A-26.9 and abolished the position of poet laureate.[3] Governor McGreevey signed the repealer into law on July 2, 2003.

Baraka filed a complaint under 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 2201 against Governor McGreevey, in his individual and official capacities, Harrington, in her individual and official capacities, the New Jersey State Council for the Arts, the State of New Jersey, and various unknown employees, agents, legislative officials, and entities of the State of New Jersey, in their individual and official capacities. Baraka alleged that by abolishing the position of poet laureate and denying him the honorarium to punish him for expressing his views, defendants violated his right to free speech under the First Amendment and his right to due process of law under the Fourteenth Amendment. Baraka also alleged various causes of action under the New Jersey Constitution and New Jersey state law. He requested payment of the $10,000-per-year

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[3] The bill lists nine state senators and three assembly members as sponsors, and fifteen state senators and fifty-five assembly members as co-sponsors. It passed with 21 votes and 19 abstentions in the State Senate, and it passed the Assembly in a 69-to-2 vote. Laura Mansnerus, *New Jersey Assembly Votes to Cut Embattled Poet's Job*, N.Y. Times, July 2, 2003, at B2.

honorarium for two years,[4] immediate reinstatement to the position of poet laureate, compensatory and punitive damages, and attorneys' fees.

The District Court granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The court dismissed Baraka's claims against the State, the Arts Council, and the unknown government employees and entities on the basis of Eleventh Amendment immunity. It dismissed the claims against Governor McGreevey and Harrington on the basis of absolute legislative immunity. The court dismissed Baraka's claim for the honorarium after concluding, under New Jersey law, he had no legally enforceable right to payment. It dismissed the claims against unknown government individuals and entities because Baraka failed to allege specific conduct on their part that led to his harm. In the absence of any viable federal claim, the court declined to exercise pendent jurisdiction over Baraka's state law claims.

On appeal, Baraka contends the District Court erred by: holding Governor McGreevey and Harrington were protected by absolute legislative immunity; (2) holding Baraka was not deprived of a constitutionally protected property interest without due process of law; (3) declining to address Baraka's claim he was deprived of a constitutionally protected liberty interest; (4) dismissing the case as to various unknown government individuals, entities, and agencies; and (5) failing to exercise pendent jurisdiction over the state law claims.[5]

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[4] On appeal, Baraka recognizes § 52:16A-26.9 provided for a single payment of $10,000 and not $10,000 per year.

[5] Baraka does not appeal the District Court's holding that claims against the State, the Arts Council, and unknown government entities and employees in their official capacities were barred by the Eleventh Amendment.

II.

The District Court had subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Our review of a district court's dismissal of a complaint under Rule 12(b)(6) is plenary. *Vallies v. Sky Bank*, 432 F.3d 493, 494 (3d Cir. 2006). A Rule 12(b)(6) motion will be granted "'if it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005) (quoting *D.P. Enter. Inc. v. Bucks County Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984)). We must accept all factual allegations in Baraka's complaint as true, but we are not compelled to accept "unsupported conclusions and unwarranted inferences," *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997), or "a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986). We review a district court's dismissal of pendent state law claims for abuse of discretion. *Markowitz v. Ne. Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990); *Cooley v. Pa. Hous. Fin. Agency*, 830 F.2d 469, 471 (3d Cir. 1987).

III.

A.

Baraka contends his claims against Governor McGreevey and Harrington are not barred by legislative immunity because neither is a legislator and their actions were not legislative in nature. He contends their actions were political—advocating legislation—and administrative—targeting a single person for punitive treatment. We believe Governor McGreevey's and Harrington's actions are properly characterized as legislative and are entitled to immunity.

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v.*

Brandhove, 341 U.S. 367, 376 (1951)). Legislative immunity shields from suit not only legislators, but also public officials outside of the legislative branch when they perform legislative functions. *See id.* (affording absolute legislative immunity to a mayor); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 734 (1980) (same, to the Virginia Supreme Court and its members); *Gallas v. Sup. Ct. of Pa.*, 211 F.3d 760, 776–77 (3d Cir. 2000) (same, to the Pennsylvania Supreme Court and its members); *Aitchison v. Raffiani*, 708 F.2d 96, 99 (3d Cir. 1983) (same, to members of a city council, a mayor, and a city attorney). The relevant question is whether Governor McGreevey and Chair Harrington's actions were "'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376).

1.

In *Youngblood v. DeWeese*, 352 F.3d 836 (3d Cir. 2004), we addressed the distinction between legislative and political activities on the part of state legislators. As examples of legislative activities, we cited "voting for a resolution, subpoenaing and seizing property and records for a committee hearing, preparing investigative reports, addressing a congressional committee, and, of course, speaking before the legislative body in session." *Id.* at 840 (internal citations omitted). We contrasted these with examples of political activities, including "'a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress.'" *Id.* (quoting *United States v. Brewster*, 408 U.S. 501, 512 (1972)). In *Youngblood*, therefore, we used the term "political" to refer to patronage practices and activities by officials, not directly related to enacting legislation. Baraka also appears to use the term to express this narrow meaning.

But as these examples illustrate, activities by legislators that directly affect drafting, introducing, debating, passing or rejecting legislation, are "'an integral part of the deliberative and communicative processes,'" and are properly characterized as legislative, not political patronage. *Id.* (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). Activities that are "'casually or incidentally related to legislative affairs but not a part of the legislative process itself,'" are not. *Id.* (quoting *Brewster,* 408 U.S. at 528).

Baraka describes the actions of Governor McGreevey and Harrington as "advocating and promoting legislation." He contends legislative immunity does not apply because they are not legislators and because these are political, not legislative, activities. But when a governor and a governor's appointee advocate bills to the legislature, they act in a legislative capacity.

Baraka appears to concede as much. He alleges Governor McGreevey and Harrington actively participated in the legislative process. The repealer was allegedly passed at the "urging, direction and request" (Second Am. Compl. ¶ 19) of defendants. It was signed into law by Governor McGreevey. As the District Court noted, "[t]he gravamen of [Baraka's] complaint is that Governor McGreevey and Harrington 'orchestrated and directed' the New Jersey legislature to abolish the position of Poet Laureate." *Baraka v. McGreevey*, No. 041959, slip op. at 6 (D. N.J. March 22, 2005). These actions were "an integral part of the deliberative and communicative processes," *Youngblood*, 352 F.3d at 840 (quotation omitted), by which the repealer was enacted, and fall squarely "'within the sphere of legitimate, legislative activity.'" *Id.* at 841 (quoting *Tenney*, 341 U.S. at 376).

In *Bogan*, the Supreme Court considered whether absolute legislative immunity applied to a mayor and to a member of a city council. 523 U.S. at 47. Both officials played central roles

in advocating, promoting, and passing an ordinance that eliminated a government office of which plaintiff was the sole employee. *Id.* In concluding absolute legislative immunity applied, the Court held the city council member's acts of voting for the ordinance were "in form, quintessentially legislative," and the mayor's acts of introducing a budget and signing the ordinance into law "also were formally legislative." *Id.* at 55.

Baraka contends he named Governor McGreevey as a defendant not because the Governor signed the repealer, but because he advocated and orchestrated the legislation that abolished the position of poet laureate. His argument appears to concede the Governor's actions were central, or integral, to the legislative process. The New Jersey Constitution authorizes the Governor to "recommend such measures as he may deem desirable," and to convene the Legislature "whenever in his opinion the public interest shall require." N.J. Const. art. V, § 1. The New Jersey Governor, therefore, is constitutionally authorized to recommend legislative measures. Furthermore, this is consistent with the type of activity designated as "legislative" in *Brewster* and *Youngblood*. As the Governor's appointee, Harrington's actions in advising and counseling Governor McGreevey and the Legislature are also legislative. *See Aitchison,* 708 F.2d at 99 (affording legislative immunity to an attorney who advised a city council in drafting an ordinance). Though neither Governor McGreevey nor Harrington were legislators, their actions as public officials in proposing and advocating the repealer are properly characterized as legislative.

Despite Baraka's characterization, his cause of action also necessarily encompasses the Governor's actions in signing the repealer into law. The position of poet laureate was eliminated by legislative repealer, which required gubernatorial approval

(absent legislative override of a veto).[6] Governor McGreevey's act of signing the repealer into law is properly characterized as a legislative action, like those designated in *Brewster* and *Youngblood*. *See Edwards v. United States*, 286 U.S. 482, 490 (1932) (noting "the legislative character of the President's function in approving or disapproving bills"); *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) (discussing a governor's actions in signing or vetoing a bill as part of the legislative process).

2.

Baraka's contention that defendants' actions were administrative does not change our conclusion. As noted, Baraka contends that in abolishing the position of poet laureate, defendants targeted him for punitive action and engaged in administrative—as opposed to legislative—activity.

In determining whether legislative immunity attaches to municipal actors engaging in arguably administrative activities, we ask whether the activities are "both substantively and procedurally legislative in nature." *In re Montgomery County*, 215 F.3d 367, 376 (3d Cir. 2000); *see Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (asking whether the act is "substantively legislative," as involving "policy-making" or "line-drawing," and "procedurally legislative," as being "passed by means of established legislative procedures") (quoting *Ryan v. Burlington County*, 889 F.2d 1286, 1290–91 (3d Cir. 1989)); *see also Bogan*, 523 U.S. at 55 (affording legislative immunity to a non-legislator who performed functions that were

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[6] Like other state constitutions, the New Jersey Constitution grants the governor a role in the finalization of all legislation. All legislation passed by both houses of the state Legislature must be presented to the governor, who is authorized to enact the law by signing it, or to veto the law by returning it to the legislature with objections. If the governor takes no action within 45 days, the bill becomes law by default. The Legislature can override a veto only by a two-thirds super-majority in both houses. N.J. Const. art. V, § 1, par. 14.

substantively and procedurally legislative). In *Gallas* we explained this two-part inquiry:

> First, the act must be "substantively" legislative, i.e., legislative in character. Legislative acts are those which involve policy-making decision [sic] of a general scope or, to put it another way, legislation involves linedrawing. Where the decision affects a small number or a single individual, the legislative power is not implicated, and the act takes on the nature of administration. In addition, the act must be "procedurally" legislative, that is, passed by means of established legislative procedures. This principle requires that constitutionally accepted procedures of enacting the legislation must be followed in order to assure that the act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve.

211 F.3d at 774 (quoting *Ryan*, 889 F.2d at 1290–91).[7]

Here, defendants are public officers and state actors. Our cases differ as to whether the two-part substance/procedure inquiry, first applied to municipal actors, is also appropriate for actors at the state level. In *Gallas*, we applied the two-part inquiry to Pennsylvania Supreme Court justices and concluded the justices were entitled to legislative immunity for their actions in reorganizing one of the state's judicial districts. *Id.* But in other cases we declined to extend the two-part inquiry to state actors. *See Youngblood*, 352 F.3d at 841 n.4 ("We have since recognized . . . that the substance/procedure test was 'developed for municipalities,' where individual officials are

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[7] We further noted that in Ryan "we did not mean to imply that a legislative body, passing a de jure law affecting only a single person, would not be entitled to legislative immunity." *Gallas v. Sup. Ct. of Pa.*, 211 F.3d 760, 774 n.14 (3d Cir. 2000).

more likely to perform a mixing of administrative and legislative functions, and thus have 'decline[d] to extend [the *Carver*] analysis . . . to other levels of government.'") (quoting *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 252 (3d Cir. 1998)) ("[B]ecause concerns for the separation of powers are often at a minimum at the municipal level, we decline to extend our analysis developed for municipalities to other levels of government."). Instead, we articulated the relevant inquiry as whether the actions in question were "within the sphere of legitimate, legislative activity." *Youngblood*, 352 F.3d at 841 (quoting *Tenney*, 341 U.S. at 376).[8]

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[8] In *Youngblood*, we found support in Bogan for our decision not to apply the two-part inquiry. We stated,

> We similarly decline to apply the *Carver* analysis to this case, especially in light of language from the Supreme Court that, we believe, casts doubt on the propriety of using any separate test to examine municipal-level legislative immunity, *see Bogan*, 523 U.S. at 49, 118 S.Ct. 966 (holding that local legislators are "likewise" absolutely immune from suit under § 1983), particularly a two-part, substance/procedure test, *id.* at 55, 118 S.Ct. 966 (refusing to require that an act must be "legislative in substance" as well as of "formally legislative character" in order to be a legislative act).

352 F.3d at 841 n. 4. But the Court in *Bogan* did not "refuse" to require an act be both procedurally and substantively legislative for immunity to apply. Rather, it concluded that because the acts in question were legislative in both respects, there was no need to determine whether the procedurally legislative character of the actions was "alone sufficient to entitle petitioners to legislative immunity." *Bogan*, 523 U.S. at 55.

We believe *Bogan*'s analysis illustrates that the two-part substance/procedure inquiry provides a useful means of determining whether allegedly administrative actions meet the standard set forth by the Supreme Court—whether the actions are "in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). We use the substance/procedure inquiry not to establish a separate and distinct standard for certain actors, but to determine whether the Court's standard has been met.

Regardless of the level of government, we believe the two-part substance/procedure inquiry is helpful in analyzing whether a non-legislator performing allegedly administrative tasks is entitled to immunity.[9] We note that in *Youngblood* and *Larsen*—the cases declining to apply the two-part inquiry to state actors—there was no allegation that the actions in question were administrative, and no need for this inquiry as a means of distinguishing between administrative and legislative actions. *See Youngblood*, 352 F.3d at 840–41; *Larsen*, 152 F.3d at 252. In addition, these cases addressed legislators' actions. *Gallas*, in contrast, addressed non-legislators' actions. Here, we similarly address the actions of non-legislators (Governor McGreevey and Harrington) performing allegedly legislative tasks. In determining whether legislative immunity applies, it is relevant to ask whether Governor McGreevey's and Harrington's actions were both substantively and procedurally legislative. If they were, they meet the standard set by the Supreme Court—they were "in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376).

We have already focused on the procedural nature of Governor McGreevey's and Harrington's actions. We noted that their actions in recommending and, in the Governor's case, signing the repealer were similar to those of the defendants in *Bogan*—actions that were "in form, quintessentially legislative." *Bogan*, 523 U.S. at 55. We agreed with the District Court that "[t]he gravamen of [Baraka's] complaint is that Governor McGreevey and Harrington 'orchestrated and directed' the New Jersey legislature to abolish the position of Poet Laureate." *Baraka*, No. 04-1959, slip op. at 6. In sum, we concluded their actions were procedurally legislative.

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[9] In *Larsen*, we explained our decision not to apply the two-part inquiry to state actors. We noted, "concerns for the separation of powers are often at a minimum at the municipal level." 152 F.3d at 252.

Their actions in support of the repealer were also substantively legislative. This law, formally enacted, eliminated the position of poet laureate, a position that was legislatively created. Eliminating the position of poet laureate constitutes the type of "policy-making" that traditional legislation entails, and the actions here were substantively legislative. *See Gallas*, 211 F.3d at 774.

In the context of public employment, we have drawn a distinction between the elimination of a position and the termination of an individual employee. *See id.* at 775 ("[T]he elimination of a public employment position—as opposed to the firing of a single individual—constitutes a 'legislative' act."); *Montgomery County*, 215 F.3d at 377 (holding decision to terminate director of county department of housing services was administrative because "[f]iring a particular employee is a personnel decision that does not involve general policy making").

Nevertheless, Baraka contends the purpose of the repealer was to remove him specifically as poet laureate after he refused to resign, and its effect is better analogized to the termination of an individual's employment than to the elimination of a position. Baraka contends he was punished for his speech, which his detractors termed anti-Semitic. In his view, the intent and motive behind the purpose of the repealer was perceived anti-Semitism. But a defendant's intent and motive are immaterial to whether certain acts are entitled to legislative immunity. *See Bogan*, 523 U.S. at 54–55. Accordingly, Baraka's allegation as to Governor McGreevey's and Harrington's intent and motive—which we accept as true in reviewing the denial of a Fed. R. Civ. P. 12(b)(6) motion—cannot affect our analysis.

In *Bogan*, plaintiff alleged defendants' actions in passing an ordinance were motivated by racial animus, and were in retaliation for her exercise of First Amendment rights. *See id.*

at 47. A jury agreed with plaintiff, finding defendants' actions had been motivated by a desire to punish plaintiff for her constitutionally protected speech. Relying on this jury finding, the Court of Appeals for the First Circuit held that because defendants' actions targeted plaintiff, they were not legislative. But the Supreme Court concluded the Court of Appeals "erroneously relied on [defendants'] subjective intent in resolving the logically prior question of whether their acts were legislative." *Bogan*, 523 U.S. at 54. The Court explained "it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 55 (emphasis omitted) (quoting *Tenney*, 341 U.S. at 377). The relevant inquiry was whether, "stripped of all considerations of intent and motive, [defendants'] actions were legislative." *Id.*

In *Youngblood*, a state representative contended two other representatives denied her adequate budget allocation for office staffing in retaliation for her complaints against their party leadership. 352 F.3dat 838. Citing *Bogan* we emphasized that a court does not consider intent and motive to determine whether legislative immunity applies to a defendant's actions. *Id.* at 841. Defendants' acts of allocating office-staffing appropriations among individual representatives were legislative acts to which immunity extended. *Id.* at 841. It was immaterial that the acts may have been intended to punish the plaintiff because "legislators' motives are irrelevant to whether their activities enjoy legislative immunity." *Id.* at 839–40; *see also Gallas*, 211 F.3d at 773 ("In determining whether an official is entitled to legislative immunity, we must focus on the nature of the official's action rather than the official's motives or the title of his or her office.").

Baraka cites *Canary v. Osborn*, 211 F.3d 324 (6th Cir. 2000), and *Kamplain v. Curry Board of Commissioners*, 159 F.3d 1248 (10th Cir. 1998), in contending an improper motive is relevant to a court's determination of whether legislative immunity applies. But neither case supports this position. In

Canary, the Court of Appeals for the Sixth Circuit concluded individual school board members were not entitled to absolute legislative immunity for their role in voting against the renewal of an employee's contract as an assistant principal. 211 F.3d at 330–31. Because they were assessing the performance and actions of an individual employee, their actions "did not have prospective implications that reach[ed] well beyond the particular occupant of the office," and accordingly were not covered by legislative immunity. *Id.* at 330 (quotation omitted). In *Kamplain*, the Court of Appeals for the Tenth Circuit concluded defendants acted in an administrative capacity foreclosing legislative immunity when they banned plaintiff's attendance, participation, and speech at meetings of a county board of commissioners. 159 F.3d at 1252. The court concluded, "[b]ecause the circumstances of this case did not concern the enactment or promulgation of public policy, we cannot say that the bans were related to any legislation or legislative function." *Id.* at 1252. Neither *Canary* nor *Kamplain* relied on defendants' subjective intent or motive in determining whether legislative immunity applied. Both cases cited *Bogan*'s directive that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *See Canary*, 211 F.3d at 329; *Kamplain*, 159 F.3d at 1251.

Baraka asks us to do what the Supreme Court has labeled erroneous—"rel[y] on [defendants'] subjective intent in resolving the logically prior question of whether their acts were legislative." *Bogan*, 523 U.S. at 54. Governor McGreevey's and Harrington's subjective intent plays no role in our analysis of whether or not their acts were legislative. The relevant question is whether, "stripped of all considerations of intent and motive, [defendants'] actions were legislative." *Id.* at 55. Both in form and in substance, the actions of both defendants were legislative. Accordingly, the District Court did not err in

holding Baraka's claims against them were barred by legislative immunity.

3.

Although we join in much of our dissenting colleague's views on the structure and history of the Speech and Debate Clause, we believe modern jurisprudence has amplified and transformed our understanding of this constitutional provision.

The separation of powers doctrine, and its attendant checks and balances, undergirds the development of the speech and debate protections afforded legislators by the United States and state constitutions. The Constitution's framers created a structure of government that would engender competition for power among the branches.

But the Constitution also establishes legislative functions for the president, quite similar to those established for the governor in the New Jersey Constitution and at issue here. Whether these legislative functions may entitle executive branch officers to absolute legislative immunity is a question the Supreme Court answered in *Tenney* and, more recently, in *Bogan*. We applied these standards in *Youngblood*, and we believe our decision here is consistent with both the Supreme Court's precedent and our own.

Our dissenting colleague insists legislative immunity is intended to shield only legislators. But this view disregards modern jurisprudence and, most strikingly, undercuts the Supreme Court's recent guidance on the issue, in *Bogan*, clearly extending absolute legislative immunity to a non-legislator public official (a mayor) who was integrally involved in the proposal, promotion and passage of legislation eliminating a municipal department. There the Supreme Court noted that "[a]bsolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (internal quotes omitted). Later, the

Court noted "[w]e have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions," adding that an executive's actions with respect to enacting legislation are "integral steps in the legislative process." *Id.* at 55. Subsequently, we noted this extension of legislative immunity to public officials outside the legislature in our description of Bogan. *See Youngblood*, 352 F.3d at 840 (Bogan held "municipal officials were immune from a plaintiff's claim that the officials violated her civil rights when they enacted a budget that eliminated her position").

If our dissenting colleague's concern is that legislative immunity would be extended to basic lobbying activity, we cannot agree. This ignores the fundamentally different roles played by a governor and his appointees in the legislative process from those played by a private party who lobbies for legislation. As noted, the New Jersey Constitution requires the governor to play a role in enacting legislation, through signing or vetoing it. It also authorizes the governor to "recommend such measures as he may deem desirable," and to convene the Legislature "whenever in his opinion the public interest shall require." N.J. Const., art. V, § 1.[10] These functions are integral steps in the legislative process, authorized by the state Constitution to the governor and, by extension, his appointees. No private lobbyist can claim such a constitutional authority to participate in the legislative process.

B.

Baraka contends that even if legislative immunity bars his claim for damages, it does not bar his claim for reinstatement

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[10] The governor is additionally given broad power to grant pardons and reprieves, and to suspend and remit fines and forfeitures, powers that necessarily overlap with the powers assigned to the judicial branch of government. N.J. Const. art. V, § 2.

against Governor McGreevey and Harrington in their official capacities. He notes that legislative immunity is a personal immunity defense, citing *Kentucky v. Graham*, 473 U.S. 159 (1985), for the proposition that personal immunity defenses are unavailable in official-capacity actions.

In *Kentucky*, the Court noted in dicta, "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167. *Kentucky* addressed whether a plaintiff—who prevailed in a suit against a governmental entity's employees in their personal capacities—could recover attorneys' fees from the entity. *Id.* at 161. It did not involve, as does this case, a claim for injunctive or declaratory relief. Accordingly, the case has limited relevance to determining whether legislative immunity bars Baraka's claim for reinstatement.

Moreover, in *Larsen*, we interpreted the Supreme Court's opinion in *Supreme Court of Virginia v. Consumers Union* to hold that at least in "appropriate cases," legislative immunity can apply to claims for declaratory and injunctive relief against officials in their official capacities.[11] *See Larsen*, 152 F.3d at 253; *Consumers Union*, 446 U.S. at 732. In determining whether a Pennsylvania Supreme Court justice's § 1983 claim for reinstatement against state senators who impeached him was an "appropriate case," we asked "whether Larsen's request for prospective relief from the Senators could be accorded

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[11] We also concluded we erred in *Acierno v. Cloutier* when we stated "the Supreme Court has never held that legislative immunity applies to both claims for damages and injunctive relief." *Larsen*, 152 F.3d at 252 (citing *Acierno v. Cloutier*, 40 F.3d 597, 607 n.8 (3d Cir. 1994) (en banc)). We recognized that "in fact the Supreme Court in *Consumers Union* did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative." *Id.* (citing *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719 (1980)).

consistent with the policies underlying legislative immunity." *Id.* Because Larsen sought "reinstatement—nothing less than that the individual senators rescind their guilty vote on this impeachment," we concluded: "It is difficult to imagine a remedy that would more directly interfere with the role assigned exclusively to the Senators by the Pennsylvania Constitution." *Id.* at 254. Accordingly, the senators were entitled to absolute legislative immunity.

Like the relief sought in *Larsen*, the relief sought by Baraka would infringe on the role of the New Jersey Legislature. Baraka seeks to require New Jersey legislators to rescind their votes repealing the statute and to enact legislation recreating the position. We agree with the District Court's conclusion that this "would be inconsistent with the general policies underlying legislative immunity," and "would seriously interfere with the role assigned exclusively to the Legislature." *Baraka*, No. 041959, slip op. at 8–9. Debating, voting on, and passing statutes are "role[s] assigned exclusively" to the Legislature, and this case is an "appropriate case" for application of legislative immunity to a claim for prospective relief. *Larsen*, 152 F.3d at 254. Accordingly, the District Court did not err in concluding that Baraka's request for reinstatement was barred by legislative immunity.

C.

The District Court dismissed Baraka's claim for the honorarium because the Legislature never appropriated funds for payment of the $10,000 provided for by § 52:16A-26.9. In the absence of an appropriation, the court held, defendants were not authorized to pay Baraka the honorarium. Accordingly, there could be no liability for withholding payment.[12] The

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[12] Baraka states the District Court held the legislature's failure to appropriate the $10,000 as of the date of Baraka's appointment "retroactively nullified," "repeal[ed]," or "eliminat[ed]" the honorarium

court explained that under the Appropriations Clause of the New Jersey State Constitution, funds can only be withdrawn from the State treasury by legislative appropriation. *See* N.J. Const. art. VIII, § 2, par. 2 ("No money shall be drawn from the State treasury but for appropriations made by law."); *see also* N.J. Stat. Ann. § 52:18-27 (West 2003) ("No money shall be drawn from the state treasury unless it has been explicitly appropriated to the purpose for which it was drawn."). The court cited the New Jersey Supreme Court's opinion in *Camden v. Byrne*, 411 A.2d 462, 470 (N.J. 1980), for the proposition that "[t]here can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations." The court rejected Baraka's contention that section 52:16A-26.9 vested in him a constitutionally protected property interest that overcame this mandate.

Under New Jersey law, a statute that devotes state revenue to a particular purpose needs a corresponding appropriation authorizing payment, and a court cannot compel the appropriation. *Camden*, 411 A.2d at 470. In *Camden*, municipalities challenged the State's failure to appropriate and expend funds in accordance with certain statutes that purported to devote tax revenues to local governments. The municipalities requested a court order requiring the legislature to make the necessary appropriations. *Id.* at 466. The court held the Appropriations Clause "firmly interdicts the expenditure of state monies through separate statutes not otherwise related to or integrated with the general appropriation act governing the state budget for a given fiscal year." *Id.* at 468. Furthermore, even if the requesting party could prove a

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provided by § 52:16A-26.9. This mischaracterizes the District Court's holding. Because the legislature had not appropriated funds to pay the honorarium, the court held defendants had no legal authority to withdraw the $10,000 from the state treasury to pay Baraka.

statutorily defined substantive right, a court could not compel an appropriation. *Id.* at 469 (citing *Amantia v. Cantwell*, 213 A.2d 251 (N.J. App. Div. 1965); *see also New Jersey Div. of Youth & Family Serv. D.C.*, 571 A.2d 1295, 1301 (N.J. 1990) ("There can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations. . . . That principle applies even if a party is clearly entitled to compensation.").

Based on the timing of the appropriations process, Baraka contends the lack of an appropriation is immaterial to whether he was entitled to the honorarium. He notes that in 1999—when the Legislature created the position of poet laureate—it appropriated $10,000 to pay the first person who held the position. Since the first poet served for two years starting in early 2000, further appropriation was not needed until late 2002, when the next poet (Baraka) was appointed. At this time, the Legislature had already adopted the State budget for fiscal year 2002–2003. Baraka contends that had the position of poet laureate not been abolished in July, the appropriation would have been made in the budget for fiscal year 2003–2004. But whether the Legislature's failure to appropriate funds was intentional or the result of indifference or oversight, the absence of an appropriation is determinative. Regardless of the legislative intent, § 52:16A-26.9 could not authorize payment of the honorarium in the absence of a corresponding appropriation of state revenue. Baraka's assertion that "it is undisputed that [defendants] refused to pay Baraka the $10,000 guaranteed by the statute" is inaccurate because it implies defendants were authorized to make a payment but chose not to do so.

There appears to be an exception to the general rule requiring a legislative appropriation. If there is a constitutional right to payment, a court may compel payment even in the absence of an appropriation. *See Youth & Family Serv.*, 571

A.2d at 1301; *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975). In *New Jersey Division of Youth and Family Services*, the issue was whether the New Jersey Supreme Court could require the legislature to disburse state funds to pay attorneys—appointed to represent indigent parents and their minor children—who were clearly entitled to compensation. The court qualified the principle that "[t]here can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations," by noting an exception "when funds are constitutionally mandated."[13] *Youth & Family Serv.*, 571 A.2d at 1301. Because the attorneys had no constitutional right to compensation, the court concluded the absence of a legislative appropriation was fatal to their claims. Here, whether the absence of an appropriation is fatal to Baraka's claims depends on whether payment of the honorarium was constitutionally mandated.

D.

Baraka contends payment of the honorarium was constitutionally mandated because New Jersey law vested in him constitutionally protected property and liberty interests when he was appointed to the position of poet laureate. He claims he was denied these interests without due process of law

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[13] The court also rejected the argument that it should find the necessary authorization in general statutory appropriation clauses. The court explained:

> [T]he statutory schemes for all departments, divisions, agencies and other units of State government include general-appropriation clauses. Thus, under its theory, we could always find that general-appropriation clauses enable us to compel the legislature to pay for whatever services we feel the state should provide. We are not persuaded that all general appropriation clauses necessarily give us such *carte blanche*.

New Jersey Div. of Youth & Family Serv. v. D.C., 571 A.2d 1295, 1300 (1990).

when the position was abolished and the $10,000 honorarium withheld.

In evaluating a procedural due process claim, we first determine "whether the asserted individual interests are encompassed within the fourteenth amendment's protection of life, liberty, or property." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) (quotations omitted). Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

"[T]he types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (quoting *Nat. Mut. Ins. Co. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). For example, individuals can have protected property interests in positions of public employment. *See Roth*, 408 U.S. at 576–77 ("[A] public college professor dismissed from an office held under tenure provisions and college professors and staff members dismissed during the terms of their contracts have interests in continued employment that are safeguarded by due process.") (internal citations omitted); *see also Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 559 (1956); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1134–35 (3d Cir. 1992). Baraka does not contend his protected property interest is based on an employment relationship with the State, nor would he succeed if he did. As poet laureate he was a state

appointee—not an employee.[14] Rather, he contends § 52:16A-26.9 created a "mutual understanding" with the State, which gave rise to a constitutionally protected property interest. He alleges both he and the State understood he was legally entitled to the honorarium.

Baraka cites *Stana v. School District of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985), for the proposition that a mutual understanding can give rise to property interests. In *Stana*, we explained, "[p]roperty interests . . . can also arise from written or unwritten state or local government policies or from 'mutually explicit understandings' between a government employer and employee." *Id.* at 126. But we clarified "[i]n all cases, the relevant inquiry is whether the claimant has a 'legitimate claim of entitlement.'" *Id.* (quoting *Roth*, 408 U.S. at 577). Furthermore, the "mutually explicit understanding" in *Stana* grew out of an employment relationship. In holding a

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[14] We look to New Jersey law in determining whether Baraka was a public employee. *See Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("[T]he sufficiency of the claim of entitlement [to a property interest in employment] must be decided by reference to state law."). New Jersey courts use two different tests to determine whether an individual qualifies as an employee. *See Lowe v. Zarghami*, 731 A.2d 14, 19–20 (N.J. 1999). The "control test" considers the following factors: "(1) the degree of control exercised by the employer over the means of completing the work; (2) the source of the worker's compensation; (3) the source of the worker's equipment and resources; and (4) the employer's termination rights." *Id.* The "relative nature of the work test" considers "the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business." *Id.* at 20 (quotation omitted). "Although used primarily in workers' compensation cases," this test is appropriate in other cases as well, such as those "involving work performed by professional employees," and where the nature of work necessarily involves independent, professional judgment. *Id.* at 20–21. Under either test, Baraka was not a state employee. The State did not exercise control over his work, provide him with facilities or resources, or pay him a regular salary. Baraka was not economically dependent on the State, nor was his work central to the operation of any State business.

school employee's place on an employment eligibility list constituted a protected property interest, we accepted plaintiff's argument that the school district's policy for maintaining the list created a "'mutually explicit understanding' that a person who earned a place on the eligibility list will not be removed from the list for four years." *Id.* at 126. We noted the Supreme Court had "'frequently recognized the severity of depriving a person of the means of livelihood,'" *id.* at 128, and reasoned that Stana's interest in remaining on the list was analogous to the plaintiffs' employment interests in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), where the Supreme Court referred to "'the significance of [an employee's] private interest in retaining employment.'" *Stana,* 775 F.2d at 128 (quoting *Loudermill,* 470 U.S. at 543). The employment relationship was central to our decision in *Stana.* Because Baraka did not hold a position of public employment, *Stana* is inapposite.

Furthermore, § 52:16A-26.9 shows no sign of a "mutually explicit understanding" that Baraka was entitled to the honorarium upon accepting the appointment. The statute provided for payment of an honorarium to the poet laureate, who, during a two-year period, would "engage in activities to promote and encourage poetry within the State." N.J. Stat. Ann. § 52:16A-26.9(d). The statute did not provide the poet laureate would receive the honorarium upon appointment. Nor did it provide the poet laureate would be entitled to the honorarium whether or not he completed his term.

Terms in New Jersey statutes not otherwise defined are to be given their generally accepted meanings. N.J. Stat. Ann. § 1:1-1. An honorarium is generally defined as "an honorary payment or reward usually given as compensation for services on which custom or propriety forbids any fixed business price to be set or for which no payment can be enforced at law." Webster's Third International Dictionary (Unabridged) (1981); *see also* Oxford English Dictionary (2d ed. 1989) (defining an

honorarium as "an honorary reward"). The statute did not create a "mutually explicit understanding" that Baraka was legally entitled to the honorarium upon appointment, giving rise to a property interest.

Nor did § 52:16A-26.9 create a contractual obligation giving rise to a property interest. As the District Court noted, "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Baraka*, No. 04-1959, slip op. at 11 (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)). The language of § 52:16A-26.9 does not demonstrate an intent on the part of the State to bind itself contractually. The statute provides "[t]he poet laureate shall receive an honorarium." § 52:16A-26.9. "Honorarium" implies a voluntary payment and not a contractual obligation. We see nothing in the statute demonstrating the state intended to enter a formal contract with Baraka.

In a different context, the Supreme Court held that if there is no obligation to pay a benefit, there can be no legitimate claim of entitlement to the benefit. In *American Manufacturers Mutual Insurance Company v. Sullivan*, the Supreme Court held that because the Pennsylvania Workers Compensation Act entitles an employee with a valid claim to payment for "reasonable" and "necessary" medical treatment, "disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise." 526 U.S. 40, 60 (1999) (emphasis in original). Until the employee has a legitimate claim of entitlement to the benefit, there can be no constitutionally protected property interest. Here, too, because defendants were not obligated to pay—and Baraka was not

entitled to receive—the honorarium, there can be no constitutionally protected property interest.

Moreover, even if the statute did create a contractual obligation, it would not confer a constitutionally protected property interest on Baraka. Only certain state contracts create protected property interests under the Fourteenth Amendment. *See Unger v. Nat'l. Residents Matching Program*, 928 F.2d 1392, 1397–98 (3d Cir. 1991). Generally, the two types of contracts that create protected property interests are those that confer a protected status—those "'characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits'"—and those where "'the contract itself includes a provision that the state entity can terminate the contract only for cause.'" *Linan-Faye Const. Co., Inc. v. Hous. Auth. of Camden*, 49 F.3d 915, 932 (3d Cir. 1995) (quoting *Unger*, 928 F.2d at 1399).

Here, the right Baraka alleges the statute conferred—an honorarium—is neither a benefit on which Baraka relies in his daily life, nor a contract terminable only for cause. At most, § 52:16A-26.9 provided Baraka with a "unilateral expectation" of a voluntary award. *Roth*, 408 U.S. at 577. It did not provide him with a "legitimate claim of entitlement." *Id.* Nor is an honorarium a form of property on which he would rely in his daily life. *See id.* ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.").

Baraka also contends he has a constitutionally protected interest in his reputation, of which he was deprived when his position was eliminated.[15] He alleges defendants caused

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[15] Baraka contends he has a property interest in his reputation. Generally, if reputational harm implicates a constitutionally protected interest, it is a liberty interest. *See Paul v. Davis*, 424 U.S. 693, 711 (1976); *Kelly v.*

"irreparable damage to his reputation, embarrassment, humiliation and emotional distress." Reputational harm can constitute a protected interest when coupled with an additional deprivation of a protected right or interest.[16] *See Paul v. Davis*, 424 U.S. 693, 711–12 (1976) (holding reputation alone is not a constitutionally protected property or liberty interest); *see also Graham v. City of Philadelphia*, 402 F.3d 139, 142 (3d Cir. 2005); *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073,

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Borough of Sayreville, N.J., 107 F.3d 1073, 1077–78 (3d Cir. 1997). *But see San Filippo*, 961 F.2d at 1134 (implying reputational harm can constitute a deprivation of a protected property interest).

[16] Baraka cites *San Filippo* for the proposition that "[w]henever a 'person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' a property interest is involved and due process requirements apply." 961 F.2d at 1134 (quoting *Roth*, 408 U.S. at 572). In *Paul*, the Supreme Court recited a nearly identical statement. *See* 424 U.S. at 708 ("'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'") (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). The Court recognized this statement "could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play." *Id.* But the Court rejected this reading, which would represent "a significant broadening" of previous cases. *Id.* Instead, the Court read the phrase "because of what the government is doing to him," to refer to "the fact that the governmental action taken in that case deprived the individual of a right previously held under state law." *Id.* This right was "the right to purchase or obtain liquor in common with the rest of the citizenry," and the governmental action in question was a state statute that allowed government officials to post notices prohibiting sale of alcoholic beverages to certain people (including the plaintiff) because of their history of problems with alcohol. *Id.* The statute "significantly altered" the plaintiff's status under state law, and "it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* at 708–09. The Court's conclusion that reputational harm alone cannot form the basis of a due process claim was "reinforced by our discussion of the subject" in *Roth*. *Id.* at 709.

1077–78 (3d Cir. 1997). In *Paul*, the Supreme Court noted that its case law did "not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul*, 424 U.S. at 701. We have noted some confusion whether the additional "more tangible interest" must be "a protectible property interest," or whether "something less than a property interest, independently protected by the Due Process Clause, could be [] sufficient." *Ersek v. Twp. of Springfield*, 102 F.3d 79, 83 n.5 (3d Cir. 1996); *see Graham*, 402 F.3d at 142 n.2. We need not decide the issue here. Baraka has pled no additional deprivation of a protected interest to couple with the alleged injury to his reputation.[17] On a Fed. R. Civ. P. 12(b)(6) motion, we accept his allegations of reputational harm as true, but we conclude he has not stated an actionable claim for

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[17] Moreover, to state a valid claim for deprivation of a protected interest based on reputational harm, a plaintiff must allege harm that forecloses future opportunities. In *Roth*, the plaintiff contended harm to his reputation, resulting from the non-renewal of his contract, amounted to deprivation of a protected liberty interest. The Court acknowledged that "nonretention in one job . . . might make him somewhat less attractive to some other employers." *Roth*, 408 U.S. at 574 n.13. But it concluded this harm "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" *Id.* In *Unger*, a plaintiff alleged harm to her reputation based on discontinuation of a university's graduate residency program, to which she had been accepted. In addressing her claim for deprivation of a protected liberty interest in her reputation, we noted she had not alleged the university's actions had "imposed upon her a stigma or other disability that generally foreclosed her freedom to take advantage of other educational opportunities." 928 F.2d at 1396. In other words, she had not established the "kind of foreclosure of opportunities" required by *Roth*. 408 U.S. at 574 n.13; *see also Ersek*, 102 F.3d at 84 (discussing the requisite showing of future harm to establish deprivation of liberty based on harm to reputation). Here, Baraka alleges defendants caused "irreparable damage to his reputation, embarrassment, humiliation and emotional distress," but he does not specifically allege a foreclosure of future opportunities.

deprivation of a constitutionally protected interest in his reputation.

E.

Baraka also contends the District Court erred by "completely ignor[ing]" the deprivation of his liberty interest. He alleges defendants deprived him of his position and of the honorarium to punish him for his views, depriving him of a liberty interest without due process of law.

The liberty interests protected by procedural due process are broad in scope, including

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Harm to reputation can, in certain circumstances, constitute deprivation of a liberty interest. *See Paul*, 424 U.S. at 711. But as noted, Baraka has not properly alleged a protected interest in his reputation. Baraka has not identified a protected liberty interest of which he was deprived. Denial of continued public employment can also constitute deprivation of a liberty interest. *See Roth,* 408 U.S. at 573. But Baraka was not employed by the state. Accordingly, the District Court did not err in declining to address his free speech claim separately from his claim of a constitutionally protected property interest.

Nor can Baraka properly state a First Amendment retaliation claim. Baraka contends he was denied a benefit—the $10,000 honorarium—in retaliation for his First Amendment expression. But Baraka cannot state a viable claim

that defendants denied him the honorarium to punish him for his views when defendants were not legally authorized to pay the honorarium because no appropriation was ever made. Accordingly, Baraka does not state a cognizable First Amendment claim. The District Court did not err in holding defendants did not deprive Baraka of a constitutionally protected property or liberty interest, or infringe upon his First Amendment rights.

F.

The District Court dismissed Baraka's claims against various unknown government defendants because Baraka did not allege they engaged in specific behavior that contributed to his harm. Furthermore, the District Court held that because there is no respondeat superior liability under § 1983, the named defendants could not be held liable for the actions of the unknown defendants. A defendant in a civil rights action "must have personal involvement in the alleged wrongs to be liable," *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003) (quotation omitted), and "cannot be held responsible for a constitutional violation which he or she neither participated in nor approved," *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201 (3d Cir. 2000). Baraka does not allege specific, personal involvement on the part of the unknown defendants, and, accordingly, the District Court did not err in dismissing the claims against them.

Baraka contends "the Complaint clearly alleges that these [defendants] were part of 'a concerted campaign. . . to remove or terminate [him] from his state position.'" In his reply brief, he adds "more detail will be possible" once he "is able to obtain discovery to shed light on Defendants' actions." Baraka's vague references to the conduct of the unknown defendants are insufficient to constitute allegations that state a claim.

Moreover, Baraka's claims against the unknown defendants are barred by the Eleventh Amendment to the extent

defendants are either state agencies or state officials sued in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of Newark*, 344 F.3d 335, 345 (3d Cir. 2003). His claims are barred by the doctrine of legislative immunity to the extent the claims are based on the involvement of these unidentified defendants in the passage of the legislation abolishing the position of poet laureate.

G.

Baraka contends the District Court erred in declining to exercise pendent jurisdiction over his state law claims. The District Court noted "[w]here the federal claims are dismissed before trial, 'the district court must decline to decide pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.'" *Baraka*, No. 04-1959, slip op. at 12 (quoting *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995)).

We have held "a refusal to exercise pendent jurisdiction over a state law claim after dismissal of all federal claims prior to trial is ordinarily not an abuse of discretion." *Edelstein v. Wilentz*, 812 F.2d 128, 134 (3d Cir. 1987). Here, it was not an abuse of discretion for the District Court to decline to exercise pendent jurisdiction after determining the considerations weighing in favor of pendent jurisdiction were not present.

IV.

As noted, Baraka contends he was punished by the Governor and the New Jersey Legislature for speaking his views—views that were perceived to be anti-Semitic. His alleged punishment consisted of the elimination of the position of New Jersey poet laureate, which Baraka then held.

On a motion to dismiss, we accept the allegations as true—any set of facts will suffice, though we are not compelled

to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations. *Schuylkill Energy*, 113 F.3d at 417; *Papasan*, 478 U.S. at 286.

This case turns not on Baraka's First Amendment right to speak his mind, but rather on whether he had a protected legal interest—constitutional or otherwise—in the continued existence of the position of New Jersey poet laureate, and his own holding of the post.

The Library of Congress began filling a position called "Consultant in Poetry" in 1937. In 1985, Congress passed legislation that changed the title of the post to United States Poet Laureate Consultant in Poetry to the Library of Congress. 2 U.S.C. § 177. The national poet laureate receives a stipend funded by a private gift. Some states began naming their own poets laureate earlier in the century, as early as 1919.[18] A review of the history of state poets laureate reveals that of the thirty-nine states that currently have a poet laureate, twenty-nine legislatures have codified their state poet laureate position; the remaining ten positions were created by executive order of the governor. These posts are typically described as "honorary," sometimes include a statutory provision for a modest stipend, but not always, and sometimes are left vacant. Some states have designated specific poets as poet laureate, either by executive order or legislation, and in several cases the post has run its course when its holder has died. Some states have codified a previously unofficial poet laureate post.

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[18] Detailed information on the history and current status of the poet laureate post in each state is available on the web site of the Library of Congress at: Main Reading Room, http://www.loc.gov/rr/main/poets/current.html (last visited on March 15, 2007). A history of the national poet laureate is available at: About the Position of Poet Laureate, http://www.loc.gov/poetry/about_laureate.html (last visited on March 17, 2007).

In summary, the position has historically been created by legislative or executive action. Thus, despite the undeniable artistic and cultural benefits of having a poet laureate, we are not aware that any state constitution requires the maintenance of the position, nor that any provision of any officially created poet laureate post protects it from appropriate official action (legislative or gubernatorial) designed to terminate it.

The New Jersey Legislature created the post of poet laureate through ordinary legislative action. The repeal of the post resulted from ordinary legislative acts by legislators and the governor. The statute contained no provision that protected it from the ordinary legislative process.

Baraka, like any person, was free to speak his views. But he had no protected legal interest in the maintenance of the position of poet laureate of New Jersey.

V.

For the reasons set forth, we will affirm the judgment of the District Court.

NYGAARD, J., *dissenting*.

I respectfully dissent. In my view, the majority holding expands the legislative immunity privilege to insulate almost every action taken by executive branch officials having some connection, however remote, with the passage of legislative acts, subsumes in part the qualified immunity doctrine, and effectively abolishes accepted causes of action against executive branch officials who meddle in the affairs of, or otherwise insinuate themselves into, the legislative process.[19]

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[19] There is no disagreement on this fact. What the majority specifically holds is that the actions which fall within the legislative immunity doctrine are Governor McGreevey's "orchestrat[ion] and direct[ion] [of] the New

I therefore dissent from that portion of the majority opinion which extends legislative immunity to former Governor McGreevey and Chairperson Harrington.

History and precedent make two things clear: First, there is no support for the claim that the protection afforded to legislators applies coextensively to non-legislators. Thus, the Majority's implication that the fact that Governor McGreevey and Ms. Harrington are not members of the New Jersey legislature is immaterial; and that they were acting in a legislative capacity when they "orchestrate[] and direct[]" bills through the legislature stands starkly at odds with both governing jurisprudence and the history of the doctrine. Second, by extending the protections of legislative immunity to nonlegislators who do more than propose legislation, but who "orchestrate[] and direct[]" legislative activities, the majority critically weakens the very foundation of the privilege, portending far-reaching results for both the vitality of the privilege and for its effect on the separation of powers.

Historically, the Speech and Debate Clause, from which legislative immunity is derived, was intended to preserve the independence and integrity of the Legislature *from* the Executive. It was designed to prevent other branches of the government from interfering with the legislators in the performance of their duties.[20] As Justice Harlan taught, "since

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Jersey legislature to abolish the position of Poet Laureate." Maj. Op. at 12.

[20] The Speech and Debate Clause in Article I, Section 6, of our Constitution is the product of a long lineage of free speech or debate guarantees that began with the English Bill of Rights of 1689, continued on to some of the first state constitutions, and also appeared in the Articles of Confederation. *Id.* (citing *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Because the principle was so firmly rooted, there was little discussion of the clause during the debates of the Constitutional Convention and it was hardly mentioned at all in the ratification debates. *Id.* Specifically, the Speech and Debate Clause provides that, "for any Speech or Debate in either House,

the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 176, 86 S.Ct. 749, 754 (1966) (citing Story, *Commentaries on the Constitution*; *II The Works of James Wilson* 37-38 (Andrews ed. 1896)).

Given that the doctrine of legislative immunity derives from a clause located in Article I, I infer that its goal is to protect the Legislative branch from improper and untoward intrusions by non-legislators from either of the coordinate branches of government. Indeed, even when the question arises as to what conduct by legislators qualifies for immunity, the Supreme Court has cautioned that, "the courts have extended the privilege to matters beyond pure speech or debate in either House, but only when necessary to prevent indirect impairment of such deliberations." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Here, instead of protecting the legislature from impairment of its deliberations, we are insulating executive intrusions into the function and deliberations of the legislature from suit. Importantly, the Supreme Court has specifically instructed that:

> the heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with

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[Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. Art. I, Sect. 6, cl. 1; *see also Youngblood v. Deweese*, 352 F.3d 836, 839 (3d Cir. 2004).

> respect to other matters which the Constitution places within the jurisdiction of either House.

Id. Legislative immunity, as derived from the Speech and Debate Clause, is meant to apply to the legislative branch of government, not all who prowl the legislative halls to importune legislators on some pet cause or another.

The bedrock of our system of government is political competition between the legislative and executive branches. Put in more familiar parlance, Congress and the President would "check" and "balance" each other. The Framers believed that "the great problem to be solved" was to design governing institutions that would afford "practical security" against the excessive concentration of political power. *The Federalist Papers* No. 48 (Madison). As Madison explained, "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." *Id.* at 308. As Professors Levinson and Pildes have pointed out, "the solution to this great problem was, instead, to link the power-seeking motives of public officials to the interests of their branches." Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers,* 119 Harv. L. Rev. 2311, 2316-17 (June 2006). By giving "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others," the Framers hoped to create a system in which competition for power among the branches would constrain each safely within its bounds. *Id. (*citing *The Federalist Papers* No. 51 (Madison), at 321-22).

Of course, it might be argued that the type of behavior at issue here is akin to such acts as preparing investigative reports, addressing a congressional committee, and speaking before a legislative body in session, all of which are accorded the

imprimatur of legislative immunity. But, it is not. We have limited legislative immunity "to include activities that are an *integral* part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Youngblood*, 352 F.3d at 840 (quoting *Gravel*, 408 U.S. at 625 (1972)) (my emphasis). Nonetheless and conversely, legislative immunity will not extend "to acts that are casually or incidentally related to legislative affairs but not part of the legislative process itself." *Youngblood*, 352 F.3d at 840 (quoting *Brewster*, 408 U.S. at 513). Thus, to me, activities such as "orchestrat[ing] and direct[ing]" the New Jersey legislature into passing a personally targeted piece of legislation -- be they undertaken by a governor or ordinary citizen — are activities which may be casually and incidentally related to legislative affairs, but are not part of the legislative process itself. I would not take garden variety lobbying activity, even if undertaken by a state governor and his representative, and place such activity under the absolute protection of the privilege.

I agree with the majority that the New Jersey Constitution permits the Governor to recommend legislation to the General Assembly. But this does not support the majority's conclusion that the Governor's actions in "recommending" legislation is "formally legislative" and entitled to the protection of a legislative privilege. In my view the Constitutional prescription that a New Jersey governor may recommend legislation does not provide Constitutional imprimatur for him or other non-legislators, to "orchestrate[] and direct[]" the legislative process. I respectfully submit that the doctrine's scope as it applies to non-legislators simply does not map as the majority would have it, from its application to legislators, and, additionally, that there is no immunity for practices that merely

relate to legislative activities. Instead, the central inquiry for non-legislators is whether the official was performing legislative functions, which the Supreme Court in *Bogan v. Scott-Harris* defined as acts that were "integral steps in the legislative process." *Bogan*, 523 U.S. 44, 55 (1998) (citing *Edwards v. United States*, 286 U.S. 482, 490 (1932)).[21]

I also agree with the majority that formal aspects necessary to the legislative process — introduction of a bill and signing it into law — qualify for legislative immunity. But here, the governor and his aide went far beyond that. We have repeatedly cautioned that "a public official's legislative immunity from suit attaches only to those acts undertaken in a legislative capacity. *It is only with respect to the legislative powers delegated to them by the state legislatures that [non-legislative officials] are entitled to absolute immunity.*" *Carver*, 102 F.3d at 100 (my emphasis). "Absolute legislative immunity attaches to all actions taken in the sphere of *legitimate* legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)) (my emphasis). But the key questions following *Bogan* are, what is legitimate — what is legislative? Indeed, even for actual legislators, the Supreme Court has rejected a reading of the doctrine that would cover everything "related to the due functioning of the legislative process." *United States v. Brewster*, 408 U.S. 501, 513 (1972). Immunity includes "activities that are an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the

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[21] The majority's opinion ignores the question of whether McGreevey's and Harrington's actions are "integral steps in the legislative process," focusing instead on whether their actions were undertaken within the "sphere of legislative activity." *See Bogan*, 523 U.S. at 54. Many actions can be said to take place within the sphere of legislative activity — including lobbying. That does not mean, however, that all such actions are entitled to legislative immunity.

consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Youngblood*, 352 F.3d at 840 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). Conversely, legislative immunity will not extend "to acts that are casually or incidentally related to legislative affairs but not part of the legislative process itself." *Youngblood*, 352 F.3d at 840 (quoting *Brewster*, 408 U.S. at 513).

Because the roots of legislative immunity seek to protect the quintessentially legislative process, the doctrine should protect action that might be inhibited, frustrated or impaired by the threat of suit where that action is central to the legislative process. Viewed in this way, it is clear that broad extension of the doctrine advocated by the majority to non-legislators' actions does not show true fidelity to the underlying basis of the doctrine, which is to protect the legislative process, and would not follow the Supreme Court's caution that the doctrine be extended only when necessary to prevent impairment of the legislative function. Accordingly, I believe that only actions that are "integral steps in the legislative process," acts that are inextricably linked to, and necessary for, the passage of legislation are entitled to protection. I conclude that the actions averred in Baraka's complaint are not "integral steps in the legislative process," and, therefore, I would reverse the District Court.[22]

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[22] The District Court grasped onto language contained within a 1994 District Court case, *Hughes v. Lipscher*, 852 F.Supp. 293 (D.N.J. 1994), for the proposition that "[i]ndividuals who are not legislators but whose acts have a substantial legislative nexus are also imbued with this absolute legislative immunity." *Hughes*, 852 F.Supp. at 296. To the extent that it overreads and over-extends the scope of the immunity doctrine, it should be affirmatively rejected. Nowhere has this standard been explicitly advocated or adopted, especially not in the case cited for it support, *Gravel*. The "substantial nexus" test would envelop a much too broad set of behavior under the doctrine, allowing non-legislators to claim legislative immunity for

Finally, I point out that by concluding that McGreevey and Harrington are not entitled to absolute legislative immunity, we do not deprive them of other valid defenses. Qualified immunity remains not only a robust defense, but is the appropriate one where defendants are public officials in the executive branch. *See Dotzel v. Ashbridge*, 438 F.3d 320, 326 n.3 (3d Cir. 2006). It may be true that McGreevey and Harrington should be protected for their role in orchestrating and directing the passage of the bill about which Baraka complains; however, the appropriate defense for them is qualified immunity — not absolute legislative immunity.

Hence, I must respectfully dissent.

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acts not just integral to the legislative process generally (such as the signing or introducing of a bill) but also for acts that could be seen as lobbying, politicking, and the like. The doctrine was plainly not intended to cover such behavior, even for legislators.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2361

AMIRI BARAKA,
Appellant

v.

JAMES E. McGREEVEY, individually;
*RICHARD J. CODEY, in his official capacity
as Acting Governor of the State of New Jersey;
STATE OF NEW JERSEY, a body corporate and politic;
NEW JERSEY STATE COUNCIL OF THE ARTS,
an agency and a body politic of the State of New Jersey;
SHARON HARRINGTON, individually and in her
official capacity as Chairperson of the
New Jersey State Council on the Arts;
JOHN DOES 1-10; MARY DOES 1-10;
UNKNOWN AGENCIES and
GOVERNMENT ENTITIES 1-10, unknown to plaintiff
at this time, individually and in their official capacities

*(Pursuant to Rule 43(c), F.R.A.P.)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 04-cv-1959
(Honorable Garrett E. Brown, Jr.)

Argued April 24, 2006
Before: SCIRICA, *Chief Judge*, NYGAARD, *Circuit Judge*, and YOHN, *District Judge*[*]

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on April 24, 2006. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered March 22, 2005, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

DATED: March 21, 2007

/seal/
Certified as a true copy and issued in lieu
of a formal mandate on April 13, 2007
Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

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[*] The Honorable William H. Yohn Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AMIRI BARAKA, Plaintiff,	:	Civ. No. 04-1959 (GEB)
v.	:	
JAMES E. McGREEVEY, et al., Defendants.	:	**MEMORANDUM OPINION**

BROWN, District Judge

This matter comes before the Court upon the Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. The Court, having considered the parties' submissions and decided the matter without oral argument pursuant to Fed. R. Civ. P. 78, and for the reasons set forth below, will grant Defendants' motion to dismiss.

I. BACKGROUND

Plaintiff Amiri Baraka ("Plaintiff" or "Baraka") was appointed by defendant Governor James E. McGreevey ("Governor McGreevey"), in consultation with the defendant New Jersey State Council on the Arts ("the Arts Council"), as the Poet Laureate for the State of New Jersey on or about July 1, 2002. Second Amended Complaint at ¶12 (hereinafter "¶_"). Plaintiff accepted the position with "the understanding that he

would serve in that position for a two year period and with the expectation of receiving an honorarium of $10,000 per year from the State."[1] ¶13. On or about September 19, 2002, Plaintiff read his poem, "Somebody Blew Up America," at the Geraldine R. Dodge Poetry Festival in Stanhope, New Jersey. The poem was his "poetic assessment of the tragic World Trade Center terrorist attack on September 11, 2001." ¶14. It included the lines: "Who knew the World Trade Center was gonna get bombed/Who told 4,000 Israeli workers at the Twin Towers to stay home that day?/Why did Sharon stay away?" Id.

Governor McGreevey was allegedly outraged by the "anti-Semitic" tone of the poem and publicly asked Plaintiff to resign from his position as Poet Laureate. Governor McGreevey's spokesman, Kevin Davitt, issued a statement that "The governor strictly criticizes any racist or anti-Semite behavior. The style of Baraka's recent verse implies that Israelis had known about the September 11 terrorism attacks." ¶15. Plaintiff publicly refused to resign or apologize for the poem and maintains that it is not anti-Semitic. ¶16

As a result of Plaintiff's refusal to resign, Governor McGreevey allegedly directed defendant Sharon Harrington ("Harrington"), the Chairperson of the Arts Council, not to pay Plaintiff the honorarium. Plaintiff alleges that they "commenced a concerted campaign . . . to remove or terminate" his position as Poet Laureate. ¶18. The New Jersey Legislature then passed legislation abolishing the position of Poet Laureate

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[1] Section 52:16A-26.9 of the New Jersey Statutes Annotated provided, in relevant part:

> There is hereby established the New Jersey William Carlos Williams Citation of Merit to be presented to a distinguished poet from New Jersey who shall be considered the poet laureate of the State of New Jersey for a period of two years. The poet laureate shall receive an honorarium of $10,000.

N.J. STAT. ANN. § 52:16A-26.9 (West 2003), *repealed by* P.L. 2003 c. 123, §1 effective July 2, 2003.

allegedly "at the urging, direction and request of [Governor McGreevey] and the other [defendants]." ¶19. On or about July 2, 2003, Governor McGreevey signed the law abolishing the position of Poet Laureate, P.L. 2003, Chapter 123. ¶20.

Plaintiff now brings a civil rights action pursuant to 42 U.S.C. Sections 1983 and 1988 and 28 U.S.C. Section 2201 et. seq., claiming: (1) that suspending the honorarium and abolishing the position of Poet Laureate violated his First Amendment rights, including his right to freedom of speech, (2) that suspending the honorarium without a prior hearing violated his right to due process under the Fourteenth Amendment, and (3) various causes of action under the New Jersey Constitution and New Jersey state law. Plaintiff seeks payment of the $10,000 per year honorarium for two years, immediate reinstatement to the position of Poet Laureate, compensatory and punitive damages, and attorneys fees. The defendants are Governor McGreevey, Harrington, the Arts Council, the State of New Jersey, various John and Mary Does and unknown governmental entities or agencies (collectively referred to as "Defendants").

II. DISCUSSION

A. Standard for a Motion to Dismiss

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. Oran v. Stafford, 226 F.3d 275, 279 (3d Cir. 2000); Langford v. City of Atl. City, 235 F.3d 845, 850 (3d Cir. 2000); Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986). The Court may not dismiss a complaint unless plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985), cert. denied, 474 U.S. 935 (1985). "The issue is not whether a plaintiff will ultimately

prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Under Rule 12(b)(6), the Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." Turbe v. Gov't of the V.I., 938 F.2d 427, 428 (3d Cir. 1991) (citing Unger v. Nat'l Residents Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1991)); see also Langford, 235 F.3d at 850; Dykes v. SE. Pa. Transp. Auth., 68 F.3d 1564, 1565, n.1 (3d Cir. 1995), cert. denied, 517 U.S. 1142 (1996); Piecknick v. Commw. of Pa., 36 F.3d 1250, 1255 (3d Cir. 1994); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.1994). A complaint may be dismissed for failure to state a claim where it appears beyond any doubt "that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the claim." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss.").

B. Plaintiff's Claims Against The State Of New Jersey, The State Council On The Arts and the Unknown Defendants Are Barred By The Eleventh Amendment

It is well established that the Eleventh Amendment provides states, state agencies and state officials with immunity from suits in federal court brought by citizens against them in their official capacities. See Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). Plaintiff concedes in his complaint that the Arts Council is an agency of the State of New Jersey. ¶ 8. Therefore, Plaintiff's claims against the State of New Jersey and the Arts Council are barred by the Eleventh Amendment and must be dismissed.

Further, Plaintiff names unknown government employees, agencies and/or entities as defendants. However, Plaintiff fails to attribute any conduct to these unknown persons and or entities. It is "well established that a defendant in a civil rights case cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." C.H. ex rel. ZH v. Oliva, 226 F.3d 198, 201 (3d Cir. 2000). Further, there is no respondeat superior liability under Section 1983. Id. at 202. Therefore, Governor McGreevey, Harrington and the Arts Council cannot be held liable for the actions of such unnamed persons or entitites. See Second Amended Complaint Count V. Accordingly, all claims related to the conduct of unknown government employees or entities must be dismissed.

C. Plaintiff's Claims Against McGreevey and Harrington Must Be Dismissed

1. *McGreevey And Harrington Are Entitled to Absolute Legislative Immunity From Plaintiff's Claims For Damages And Prospective Relief*

State legislators are absolutely immune from suit and liability for their legislative activities. Tenney v. Brandhove,

341 U.S. 367 (1951); Youngblood v. DeWeese, 352 F.3d 836, 839 (3d Cir. 2003). Further, "[o]fficials outside the legislative branch are entitled to absolute immunity when they perform legislative functions." Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998). "In determining whether an official is entitled to legislative immunity, we must focus on the nature of the official's action rather than the official's motives or the title of his or her office." Gallas v. The Supreme Court of Penn., 211 f.3d 760, 773 (3d Cir. 2000) (citing Bogan, 523 U.S. at 54).

Plaintiff first argues that Governor McGreevey and Harrington are not entitled to legislative immunity because their actions were not "integral steps in the legislative process." Bogan, 523 U.S. at 55. However, courts have adopted a flexible and pragmatic approach to determining whether a defendant's actions fall within "the sphere of legitimate legislative activity;" legislative immunity is not limited to debating, drafting or voting on legislation. See Larsen v. Senate of Com. of Pa., 152 F.3d 240, 251 (3d Cir. 1998); see e.g. Tenney, 341 U.S. at 379 (according legislative immunity to state legislators accused of intimidating and or silencing a witness by holding a hearing and encouraging prosecution of the witness); Powell v. McCormack, 395 U.S. 486 (1969) (according legislative immunity to members of Congress in suit challenging the refusal by the House to seat an elected member). The gravamen of Plaintiff's complaint is that McGreevey and Harrington "orchestrated and directed" the New Jersey legislature to abolish the position of Poet Laureate. These allegations clearly suggest that the defendants actively participated in the legislative process.

Further, case law suggests that policy formulation and introduction can constitute integral steps in the legislative process. For example, in Bogan, the Supreme Court held that an executive's introduction of a budget and signing into law an ordinance were formally legislative. Bogan, 523 U.S. at 55; see also Hughes v. Lipscher, 852 F.Supp. 293, 298 (D.N.J. 1994)

(holding that legislative immunity applies to aides involved in the formulation of policy but not empowered to effect its adoption). Here, Governor McGreevey and Harrington allegedly convinced or compelled the New Jersey legislature to pass legislation and then Governor McGreevey signed the legislation. These actions undoubtedly have a substantial nexus to the legislative process. See Hughes, 852 F. Supp. at 296 ("Individuals who are not legislators but whose acts have a substantial legislative nexus are also imbued with this absolute legislative immunity.").

Plaintiff further contends that legislative immunity is unavailable because the defendant's actions "were not directed at 'traditional legislation,' but aimed instead at punishing Plaintiff for the exercise of his constitutional rights." See Plaintiff's Opposition Brief ("Pl. Opp.") at 14. As a threshold matter, it is well settled that "[t]he claim of an unworthy purpose does not destroy the privilege." Tenney, 341 U.S. at 377; Aitchison v. Raffiani, 708 F.2d 96, 98 (3d Cir. 1983) (citing Tenney). Therefore, this Court need not examine whether Governor McGreevey and Harrington engaged in activity for the purpose of retaliating against the Plaintiff. This Court need only determine "whether, stripped of all considerations of intent and motive, [defendants'] actions were legislative." Bogan, 523 U.S. at 56.

Plaintiff's attempt to cast this case as an employment action is unavailing. Plaintiff argues that legislative immunity is unavailable where, as here, the actions are directed at a single individual. However, the cases Plaintiff relies upon are factually inapposite to the present case. Each of these cases correctly holds that the decision to terminate an individual's employment is not a legislative act. See In re Montgomery County, 215 F.3d 367, 376 (3d Cir. 2000) (holding that the decision to eliminate a particular employee rather than the employee's position does not constitute a legislative act); Acevedo-Garcia v. Roberto Vera-Monroig, 204 F.3d 1 (1st Cir.

2000) (holding that selective layoffs of particular employees does not constitute a legislative act); Canary v. Osborn, 211 F.3d 324 (6th Cir. 2000) (holding that termination of specific employees does not constitute a legislative act). But Plaintiff's employment was not terminated in this case. Here, the New Jersey Legislature abolished the position of Poet Laureate. This distinction proves dispositive.

In sharp contrast to employee personnel decisions, the elimination of a public employment position does constitute a legislative act. As the Court in Gallas emphasized, "the elimination of a public employment position — as opposed to the firing of a single individual — constitutes a 'legislative' act." Gallas, 211 F.3d at 775. Unlike the hiring or firing of a particular employee, the elimination of a public employment position "may have prospective implications that reach well beyond the particular occupant of the office." Bogan, 211 F.3d at 776. Here, the Legislature's decision to abolish the position is properly construed as embodying a policy decision to discontinue the position of Poet Laureate. The implications of this determination extend beyond Plaintiff's employment. Therefore, it is clear that Governor McGreevey and Harrington's alleged involvement in the abolishment of Plaintiff's position qualifies as legislative activity.

Further, Plaintiff's request for reinstatement is inconsistent with the general policies underlying legislative immunity. Although the principles of separation of powers and state sovereignty do not require this Court to decline jurisdiction over Plaintiff's reinstatement claims, "meddling in the internal affairs of a state legislature [is] 'startlingly unattractive.'" See Larsen, 152 F.3d at 247 (citing Davids v. Akers, 549 F.2d 120, 123 (9th Cir. 1977)). In Larsen, an impeached Supreme Court justice brought an action against numerous Senators for their role in his removal from office and sought reinstatement. The Third Circuit concluded that the Senators were entitled to legislative immunity. The panel emphasized that

> [t]his is not a case where the court, should [the plaintiff] be successful, need merely direct the seating of a properly elected legislator (citations omitted) . . . [the plaintiff] seeks reinstatement — nothing less than that the individual Senators should rescind their guilty vote on his impeachment. It is difficult to imagine a remedy that would more directly interfere with the role assigned exclusively to the Senators . . .

Larsen, 152 F.3d at 253-54. This Court would find itself in a similarly precarious situation should it conclude that Plaintiff is entitled to reinstatement. In order to reinstate Plaintiff to the position of Poet Laureate, this Court must order the Legislature to rescind their votes repealing Section 52:16A-26.9 of the New Jersey Statutes Annotated ("the Statute") and enact legislation recreating the position of Poet Laureate. This Court declines to order such extraordinary relief. Such a decision would seriously interfere with the role assigned exclusively to the Legislature. Courts are not the place for resolution of controversies attributing improper motives to legislative conduct. See Tenney, 341 U.S. at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."). Accordingly, this Court finds that Governor McGreevey and Harrington are entitled to absolute legislative immunity from Plaintiff's claims for both damages and reinstatement. See Larsen v. Senate of Com. of Pa., 152 F.3d 240, 252-53 (3d Cir. 1998) ("Reexamination of the cited cases discloses that in fact the Supreme Court in Consumers Union did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative.") (citing Supreme Court of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719, 731-34 (1980)).

2. *Plaintiff Cannot State A Claim Against McGreevey and Harrington For Not Paying The Honorarium Because The Legislature Did Not Appropriate The Funds*

Even accepting Plaintiff's allegations as true, he cannot recover the $10,000 honorarium because the legislature never appropriated the funds for disbursement. Plaintiff's expectation of an honorarium under the Statute does not constitute a legally-enforceable entitlement without a legislative appropriation of the funds. Article VIII, Section 2, Paragraph 2 of the New Jersey State Constitution, the Appropriations Clause, "is the center beam of the State's fiscal structure." Camden v. Byrne, 82 N.J. 133, 146 (N.J. 1980). Under the Appropriations Clause, monies only can be withdrawn from the State Treasury by legislative appropriation. In Camden, the New Jersey Supreme Court stated unequivocally that "[t]here can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations." Camden, 82 N.J. at 149.

Plaintiff contends that New Jersey law created a "mutually explicit understanding" that he would receive the honorarium such that it created a vested property interest protected by the Fourteenth Amendment. However, the New Jersey Supreme Court has explicitly recognized that

> the judiciary is unable to compel a requested appropriation even where a statutorily-defined substantive right to the monies is established, observing that although the particular statute clearly gave petitioners a substantive right to the monies they were seeking, the court could not compel payment since 'the Legislature ha[d] declined to appropriate funds' for such a purpose.

Id. at 148 (citing Amantia v. Cantwell, 89 N.J. Super. 7, 12-15 (N.J. Super. Ct. App. Div. 1965)). The appropriation of funds is within the exclusive dominion of the Legislature and "even though certain . . . statutes . . . 'dedicate' state revenues for a particular purpose, the Legislature has the inherent power to disregard prior fiscal enactments." Camden, 82 N.J. at 147. Here, the Legislature never appropriated the funds for payment of the honorarium. Coupled with the Legislature's decision to abolish the position of Poet Laureate, it is clear that the Legislature did not intend to award Plaintiff the honorarium.

Moreover, it is clear that the Statute did not create a binding obligation on the State to pay the honorarium. It is well established that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." Nat'l Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451, 465-66 (1985) (quoting Dodge v. Bd. of Ed., 302 U.S. 74, 79 (1937)); see also Spina v. Consolidated Police and Firemen's Pension Fund Comm., 41 N.J. 391, 400 (N.J. 1964) ("He who asserts the creation of a contract with the state . . . has the burden of overcoming the presumption.") (quoting Dodge, 302 U.S. at 78). This presumption is based on the proposition that "the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." Nat'l Railroad, 470 U.S. at 466 (citing Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 104-05 (1938).

In determining whether the Statute created a contractual obligation to pay the honorarium, the Court must focus on the language of the Statute. See Dodge, 302 U.S. at 78. "If [the statute] provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear." Id. The Statute merely provided that "[t]he poet laureate shall receive an honorarium of $10,000." This

language clearly falls short of contractually binding the state to pay the honorarium. Further, an "honorarium" is commonly defined as a voluntary reward that cannot be enforced at law. See Webster's Third New International Dictionary (Unabridged) (defining "honorarium" as "an honorary payment or reward usually given as compensation for services on which custom or propriety forbids any fixed business price to be set or for which no payment can be enforced at law"); Cunningham v. Commr. of Internal Revenue, 67 F.2d 205 (3d Cir. 1933) ("[I]n common understanding, [honorarium] means voluntary reward for which no remuneration could be collected by law"). Therefore, it is clear that Plaintiff did not have a vested property interest in the honorarium.

Accordingly, this Court finds that Plaintiff cannot state a viable claim against Defendants for failure to pay the $10,000 honorarium. Plaintiff did not have a legal entitlement to the honorarium and, in the absence of a legislative appropriation, the Defendants did not have the legal authority to confer payment.

D. This Court Declines To Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claims

In the absence of a viable federal claim, this Court declines to exercise jurisdiction over Plaintiff's remaining state law claims. Where the federal claims are dismissed before trial, "the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (citations omitted). The Court finds none of these considerations to be present in this case. Accordingly, Plaintiff's state law claims are dismissed.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted and Plaintiff's complaint is dismissed. An appropriate form of order is filed herewith.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AMIRI BARAKA, Plaintiff,	:	Civ. No. 04-1959 (GEB)
v.	:	
JAMES E. McGREEVEY, et al., Defendants.	:	**ORDER**

BROWN, District Judge

This matter comes before the Court upon the Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted; and the Court, having considered the parties' submissions and decided the matter without oral argument pursuant to Fed. R. Civ. P. 78; and for the reasons set forth in the Memorandum Opinion accompanying this Order;

IT IS THIS 21st day of March 2005, hereby

ORDERED that Defendants' motion to dismiss is GRANTED; and

IT IS FURTHER ORDERED that the Clerk is directed to mark this case CLOSED.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

STATUTORY PROVISIONS INVOLVED

New Jersey P.L. 1999, c. 228, codified at Stat. Ann. § 52:16A-26.9, provided before its repeal in July 2003:

CHAPTER 228

AN ACT establishing the New Jersey William Carlos Williams Citation of Merit, supplementing Title 52 of the Revised Statutes and making an appropriation.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.52:16A-26.9 New Jersey William Carlos Williams Citation of Merit.

1. a. There is hereby established the New Jersey William Carlos Williams Citation of Merit to be presented to a distinguished poet from New Jersey who shall be considered the poet laureate of the State of New Jersey for a period of two years. The poet laureate shall receive an honorarium of $10,000.

b. The New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts, shall biennially appoint and convene a panel of four persons who are either distinguished poets or persons who represent a range of stylistic approaches in the field of poetry. Each member of the first such panel shall be from New Jersey. After the term of the first poet laureate and each subsequent poet laureate has expired, that person shall serve as one of the members of the panel for a period of two years and participate in the selection of the next poet laureate. The panel shall submit to the Governor the name of the poet to whom the citation of merit shall be presented and who shall be considered poet laureate of the State for the subsequent two years.

c. The Governor shall present biennially the New Jersey William Carlos Williams Citation of Merit.

d. The poet laureate shall engage in activities to promote and encourage poetry within the State and shall give no fewer than two public readings within the State each year while the poet holds the laureate designation.

e. The New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts, shall establish such guidelines as are deemed necessary to effectuate the purposes of this section.

2. There is appropriated $10,000 from the General Fund to the Department of State to effectuate the purposes of this act.

3. This act shall take effect immediately.

Approved October 4, 1999.

New Jersey P.L. 2003, c. 123, provides:

CHAPTER 123

AN ACT concerning the State poet laureate and repealing P.L. 1999, c. 228.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

Repealer.

1. P.L. 1999, c. 228 (C.52:16A-26.9) is hereby repealed.

2. This act shall take effect immediately.

Approved July 2, 2003.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 30, 2007

Mr. Robert Thomas Pickett
80 Main Street SUite 430
West Orange, NJ 07052

Re: Amiri Baraka
v. James McGreevey, et al.
Application No. 06A1113

Dear Mr. Pickett:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on May 30, 2007 extended the time to and including July 19, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Heather Trant

Heather Trant
Case Analyst

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(2)

FILED
OCT 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-79

In the
Supreme Court of the United States

AMIRI BARAKA,

Petitioner,

v.

JAMES MC GREEVEY, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner asks this Court to review the Third Circuit's unexceptional application of the settled law which provides that state officials who engage in acts that are part of the legislative process are immune from suit. In this case, petitioner alleges that a former Governor of New Jersey and his aide orchestrated the passage of a statute, signed into law by the Governor, which repealed a statute that had provided for the position of poet laureate of New Jersey. The Third Circuit followed this Court's precedent and properly determined that legislative immunity barred petitioner's claims concerning the enactment of this statute. Intervention by this Court is not warranted, where the standards governing legislative immunity are clear and the circuit courts have applied them consistently.

In 1999, the New Jersey Legislature enacted a statute which established the "New Jersey William Carlos Williams Citation of Merit" to be presented to a poet "who shall be considered the poet laureate of the State of New Jersey for a period of two years." P.L. 1999, c. 228, codified at *N.J. Stat. Ann.* §52:16A-26.9. The legislation provided that the poet laureate would be selected by a panel convened by the New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts, and would receive an honorarium of $10,000. *Ibid.*

Pursuant to this statute, petitioner Amiri Baraka was named the New Jersey poet laureate in July 2002 (Pa3).[1] On September 19, 2002, Baraka publicly read one of his poems at the Geraldine R. Dodge Poetry Festival in Stanhope, New

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[1] "Pa" refers to the appendix to the petition for *certiorari*.

Jersey. This poem,[2] entitled "Somebody Blew Up America," commented on the World Trade Center attack of September 11, 2001 with the following lines:

> Who found Bin Laden, maybe they Satan/Who pay the CIA/Who knew the bomb was gonna blow/Who know why the terrorists/Learned to fly in Florida, San Diego/Who know why Five Israelis was filming the explosion/And cracking they sides at the notion/ ... Who knew the World Trade Center was gonna get bombed/Who told 4000 Israeli workers at the Twin Towers/To stay home that day/Why did Sharon stay away?

The poem, with its suggestion of Israeli complicity in the September 11 terrorist attack, provoked an outcry and calls for Baraka's resignation as poet laureate. Petition for *certiorari* at 3-4 and Pa4. Baraka refused to resign or apologize for the poem. Almost a year later, the New Jersey Legislature passed a statute which repealed *N.J. Stat. Ann.* §52:16A-26.9, the legislation which had provided for the New Jersey William Carlos Williams Citation of Merit and the selection of a poet laureate. Governor McGreevey signed this bill into law on July 2, 2003. P.L. 2003, c. 123.

On April 26, 2004 Baraka filed a complaint in the United States District Court, District of New Jersey. The complaint named as defendants Governor McGreevey; Sharon Harrington, the Chairperson of the New Jersey State Council on the Arts; the State; the Arts Council; and unknown individuals and agencies.

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[2] The complete text of the poem was attached to the complaint filed by Baraka in this matter. It is also available at the web site indicated in the Third Circuit's opinion below at Pa4, n.2.

The complaint, brought under 42 U.S.C. §§1983 and 1988 and 28 U.S.C. §2201 *et seq.*, alleged that as a result of plaintiff's refusal to resign as poet laureate, Governor McGreevey directed defendant Harrington, as Chairperson of the Arts Council, not to pay to plaintiff the statutorily-authorized $10,000 honorarium. It further alleged that the New Jersey Legislature enacted legislation "orchestrated and directed" by the Governor's "office, agents and staff," and that Governor McGreevey signed this statute into law, abolishing the position of poet laureate. The complaint claimed that these actions were directed at plaintiff because of his poem, in violation of the First and Fourteenth Amendments (Pa5). The complaint sought payment of the honorarium, reinstatement to the poet laureate position, damages and attorneys fees (Pa6).

Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), on the basis that accepting the allegations for purposes of the motion as true, the complaint failed to state a claim upon which relief can be granted. In an opinion dated March 21, 2005, the Honorable Garrett E. Brown, Jr., U.S.D.J., granted defendants' motion to dismiss the complaint (Pa46 to Pa59). Judge Brown held that the Eleventh Amendment barred plaintiff's claims against the State, the Arts Council and unknown government employees and entities. He further determined that claims against the unknown employees and entities must be dismissed because plaintiff failed to attribute any conduct to them. Judge Brown also dismissed all claims related to non-receipt of the $10,000 honorarium, based on the conclusion that plaintiff had no contractual or other legally-enforceable entitlement to such payment where the Legislature did not appropriate funds for the honorarium. Finally, he dismissed the claims concerning the abolition of the poet laureate position on the basis that Governor McGreevey and Harrington had absolute legislative immunity in this regard.

In an opinion dated Mach 21, 2007, the United States Court of Appeals for the Third Circuit affirmed the dismissal of the complaint. (Pa1 to Pa43), reported at 481 F.3d 187 (3d Cir. 2007). With regard to the legislative immunity accorded to

Governor McGreevey and Harrington, which is the sole aspect of the decision below challenged by the petition for *certiorari*, the court held that because the complaint alleged that the actions of McGreevey and Harrington were legislative, they were entitled to absolute immunity (Pa9). The Third Circuit followed the rule established by the Supreme Court that absolute legislative immunity shields from suit not only legislators, but also public officials outside of the legislative branch when they perform legislative functions. (Pa8, citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 734 (1980); *Tenney v. Brandhove*, 341 U.S. 367 (1951)). The Third Circuit stated that the issue here is whether the actions of the defendants were "in the sphere of legitimate legislative activity." (Pa8, quoting *Bogan* and *Tenney*). It noted that in *Bogan*, the Supreme Court held that legislative immunity applied to a mayor and a city council member who

> played central roles in advocating, promoting, and passing an ordinance that eliminated a government office of which plaintiff was the sole employee. *Id.* In concluding absolute legislative immunity applied, the Court held the city council member's acts of voting for the ordinance were "in form, quintessentially legislative," and the mayor's acts of introducing a budget and signing the ordinance into law "also were formally legislative." *Id.* at 55. [Pa9-Pa10].

The Third Circuit determined that Baraka had conceded that Governor McGreevey and Harrington had similarly "actively participated in the legislative process." (Pa9). The court found that Baraka's claim, as stated in his complaint and in his briefs, is that these two public officials had "advocat[ed]," "promote[ed]," and "orchestrated" the legislation in question (Pa9, Pa10). The Third Circuit therefore noted its agreement with the District Court's conclusion that the gravamen of the complaint is that the above two officials

"'orchestrated and directed' the New Jersey legislature to abolish the position of Poet Laureate.'" (Pa14).

The court further determined that Baraka had "conceded" that Governor McGreevey's actions were "central, or integral," to the legislative process (Pa10). The court observed that the New Jersey Constitution authorizes the Governor to recommend legislation (Pa10). The court concluded further that the cause of action here also necessarily encompassed the Governor's legislative action of signing the statute into law (Pa10-Pa11). Harrington, as the Governor's appointee, was also entitled to immunity for her role in assisting the Governor in the legislative process (Pa9-Pa10).[3]

The Third Circuit also rejected petitioner's argument that the actions of the Governor and Harrington were administrative rather than legislative. Relying on *Bogan*, the Court determined that the applicable test for evaluating this claim is whether the officials' activities were both substantively and procedurally legislative in nature (Pa13 to Pa14). The Court held that pursuant to this standard, the defendants were properly afforded legislative immunity. The Court reiterated that the actions of which Baraka complained — the orchestration and direction of the New Jersey Legislature's enactment of a statute — were procedurally legislative (Pa14). The Court concluded that these actions also were substantively legislative because they involved elimination, by statute, of a position that had been legislatively created, thus constituting "the type of 'policy-making' that traditional legislation entails...." (Pa15).

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[3] Judge Nygaard dissented on the basis that the act of orchestrating and directing the enactment of legislation by a governor and his aide does not fall within the protection of legislative immunity. The majority opinion commented that this view is contrary to the Supreme Court's decisions in *Bogan* and *Tenney* (Pa18 to Pa19).

In this regard, the Court further stated:

> Baraka asks us to do what the Supreme Court has labeled erroneous – "rel[y] on [defendants'] subjective intent in resolving the logically prior question of whether their acts were legislative." *Bogan*, 523 U.S. at 54. Governor McGreevey's and Harrington's subjective intent plays no role in our analysis of whether or not their acts were legislative. The relevant question is whether, "stripped of all considerations of intent and motive, [defendants'] actions were legislative." *Id.* at 55. Both in form and in substance, the actions of both defendants were legislative. [Pa17].

The Third Circuit also considered Baraka's contention that legislative immunity did not bar his claim for reinstatement as poet laureate against the Governor and Harrington in their official capacities. The Court indicated that it has interpreted the Supreme Court's opinion in *Supreme Court of Virginia*, *supra*, as holding that in appropriate cases, legislative immunity applies to claims for declaratory and injunctive relief against officials in their official capacities (Pa20). The Court relied on its prior opinion in *Larsen v. Senate of Commonwealth of Pa.*, 152 F.3d 240 (3d Cir. 1998), in which it considered a complaint brought by a Pennsylvania Supreme Court justice against state senators who had impeached him. In *Larsen*, the Third Circuit held that the senators were entitled to absolute legislative immunity. This immunity extended to the plaintiff's request for reinstatement to his judicial position. The Third Circuit explained here that in *Larsen*, it had determined that legislative immunity barred the claim for reinstatement because such a remedy, which would require the legislators to rescind their impeachment votes, interfered with the legislative process. The court concluded here:

> Like the relief sought in *Larsen*, the relief sought by Baraka would infringe on the role of the New Jersey Legislature. Baraka seeks to require New Jersey

> legislators to rescind their votes repealing the statute and to enact legislation recreating the position. We agree with the District Court's conclusion that this "would be inconsistent with the general policies underlying legislative immunity," and "would seriously interfere with the role assigned exclusively to the Legislature." Debating, voting on, and passing statutes are "role[s] assigned exclusively" to the Legislature, and this case is an "appropriate case" for application of legislative immunity to a claim for prospective relief. [Pa21 (citations omitted)].

On July 19, 2007, Baraka filed a petition for *certiorari* with regard to the Third Circuit's grant of legislative immunity. By letter dated September 10, 2007, the Supreme Court directed that a response be filed on behalf of the respondents.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE THE THIRD CIRCUIT CORRECTLY HELD, CONSISTENT WITH THE DECISIONS OF THIS COURT, THAT THE GOVERNOR AND HIS AIDE ENGAGED IN ACTS THAT WERE PART OF THE LEGISLATIVE PROCESS WHERE, ACCORDING TO THE CLAIM OF THE PETITIONER, THEY ORCHESTRATED AND DIRECTED THE PASSAGE OF LEGISLATION AND THE GOVERNOR SIGNED THAT LEGISLATION INTO LAW.

The Supreme Court has held that officials outside the legislative branch have legislative immunity where they engage in actions integral to the legislative process. See *Bogan, supra.* The actions of Governor McGreevey and Arts Council Chairperson Harrington which are challenged here – orchestrating and directing the passage of legislation and signing that legislation into law – are unquestionably acts integral to the legislative process, pursuant to this Court's

precedents as well as the consistent rulings of circuit courts which have considered similar activities by officials.

In addition to being procedurally legislative, the activities of the Governor and his aide were substantively legislative. In *Bogan*, this Court unambiguously held that legislation which abolishes a position meets the substantively legislative criterion, and that the intent underlying enactment the legislation may not be considered. The Third Circuit properly followed this rule in concluding that legislative immunity applied here.

A. The Third Circuit Properly Held That Governor McGreevey And Harrington Performed Legislative Functions In Directing The Legislature's Passage Of Legislation And In Signing It Into Law.

It has been settled by the Supreme Court that legislative immunity applies both to legislators and other public officials when they perform legislative functions. *Bogan*, *supra*, 523 U.S. at 55; *Supreme Court of Virginia*, *supra*, 446 U.S. at 734. According to the Supreme Court, whether such immunity applies requires a determination as to whether the officials' actions were "'in the sphere of legitimate legislative activity.'" *Bogan*, *supra*, 523 U.S. at 54, quoting *Tenney*, *supra*, 341 U.S. at 376. The standard which governs this inquiry, according to this Court, is that legislative immunity applies to activities that are "part of the legislative process," as distinguished from those that are "casually or incidentally related to legislative affairs." *United States v. Brewster*, 408 U.S. 501, 516 (1972). *See also Gravel v. United States*, 408 U.S. 606, 625 (1972).

The overarching principle is that an activity is part of the legislative process for immunity purposes where it is, as the Supreme Court has stated with regard to Congress, "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. The

immunity enjoyed by members of Congress for their legislative actions is equivalent to the legislative immunity accorded to state and local officials. *See Bogan, supra*, and *Tenney, supra*. Based on this standard, the Court has identified examples of activities that are part of the legislative process for immunity purposes, such as voting for legislation or a resolution, preparing investigative reports, addressing a legislative committee or body, introducing a budget and signing or vetoing legislation. *See Bogan, supra*; *Gravel, supra*; *Powell v. McCormack*, 395 U.S. 486 (1969); *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Johnson*, 383 U.S. 169, 184 (1966). *See also Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (legislators' meetings with interested parties, including executive officers, concerning pending legislation); *Aitchison v. Raffiani*, 708 F.2d 90 (3d Cir. 1983) (borough attorney's advising legislative body with regard to drafting ordinance).

In contrast, activities that are not considered being part of the legislative process include services performed for constituents, such as assisting in procuring government contracts; sending newsletters to constituents; issuing news releases; and delivering speeches outside of Congress. *United States v. Brewster, supra*, 408 U.S. at 512. The Seventh Circuit cases upon which petitioner principally relies (petition at 13), further illustrate the distinction between legislative actions and those that are "incidentally related to legislative affairs." *Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991), *cert. den.* 504 U.S. 910 (1992), involved the latter type of activity. A mayor's action in ordering the removal of the plaintiff from a city council meeting was deemed non-legislative. *Id.* at 400. *See also id.* at 402-03 (emphasizing that the portion of the meeting from which plaintiff was ejected did not involve discussion of any legislative issues). In contrast, in *De la Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997), the court held that an alderman's request to postpone a legislative hearing was entitled to legislative immunity; such action was "inextricably intertwined with the legislative process of introducing and

voting on the zoning ordinances and cannot be separated from those legislative functions." *Id.* at 906.

The Third Circuit appropriately followed Supreme Court precedents in concluding that Governor McGreevey and Harrington engaged in acts that were integral parts of the legislative process, rather than in conduct only incidentally related to legislative affairs. Indeed, the complaint here specifically contends that these defendants performed acts integral to the legislative process by orchestrating and directing the Legislature's passage of the statute in question. Moreover, the complaint states that Governor McGreevey signed the legislation into law.

The act of a Governor in signing a statute into law is unquestionably an integral step in the legislative process for purposes of legislative immunity. *Bogan, supra*; *Edwards v. U.S.*, 386 U.S. 482, 490 (1932); *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932). Indeed, petitioner does not dispute this. Petition at 13. Since it is also undisputed that Governor McGreevey signed the statute here into law, the Third Circuit properly granted legislative immunity.

Petitioner's characterization of the Governor's and Harrington's other actions as merely involving the communication of their views to legislators (Petition at 15), is flatly contradicted by the complaint itself, which says that these officials orchestrated and directed the Legislature to enact the legislation. The Third Circuit determined that these allegations constituted a concession by petitioner that the officials' actions were integral to the legislative process (Pa10). Petitioner cannot now disavow his complaint's allegations.

A Governor's orchestration of the Legislature to pass a legislative measure that he supports is an activity that is "quintessentially legislative." *See Bogan, supra*, 523 U.S. at 55. The Third Circuit's determination rests on the inarguable premise that a Governor and his aides are critical participants in the process of securing enactment of legislation. The New

Jersey Constitution requires that every bill that passes the Legislature shall be presented to the Governor, who may sign or veto it. *N.J. Const.* art. V, §1, ¶14. In view of the Governor's power to veto legislation, his position on pending bills must be accommodated by the Legislature. *Cf. Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress"). *See also N.J. Const.* art. V, §1, ¶12 (governor's power to recommend measures to the Legislature). Thus, the Governor and Harrington were not mere "lobbyists." As the Third Circuit observed here, such a characterization "ignores the fundamentally different roles played by a governor and his appointees in the legislative process from those played by a private party who lobbies for legislation." (Pa19). Petitioner himself recognized this in his complaint, which claims that Governor McGreevey and Harrington directed and orchestrated the Legislature's enactment of legislation sought by the Governor.

In short, the conclusion that the defendants' activities were integral steps in the legislative process is fully in accord with well-settled law. Indeed, this result is compelled by the essential purpose of legislative immunity as expressed by this Court. Absolute legislative immunity is designed to protect the "deliberative and communicative processes" which are at the heart of the enactment of legislation. *Gravel v. United States*, *supra*, 408 U.S. at 625. As a result, legislative immunity affords protection against suits which inquire into how ... [the legislator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee...." *Brewster*, *supra*, 408 U.S. at 526. This is precisely the inquiry petitioner seeks here with regard to defendants' actions in directing and orchestrating the enactment of the legislation in question.

B. The Third Circuit Properly Followed *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) In Determining That The New Jersey Legislature's Enactment Of Legislation Repealing The Poet Laureate Statute Was A Substantively Legislative Act.

As stated by petitioner, and as recognized by the Third Circuit here, the Supreme Court has held that legislative immunity requires that the act in question be legislative both substantively and procedurally. The Third Circuit applied this two-part test in concluding that Governor McGreevey and Harrington are entitled to legislative immunity. Petitioner's claim that the Third Circuit used an incorrect test, or one that differs from that used by other circuits, is without merit. Petitioner's untenable argument is based on cases which involve markedly different facts from the situation in this case. The Third Circuit's application of the appropriate test to the facts presented here was fully consistent with this Court's ruling in *Bogan* and the decisions of the circuit courts following *Bogan.*

In *Bogan*, the Supreme Court conferred legislative immunity in a case that is factually similar to the present one. The plaintiff was the sole employee of the Department of Health and Human Services of the City of Falls River. The City adopted a budget ordinance which eliminated this department and thereby terminated plaintiff's employment. She filed a §1983 suit against the mayor and members of the city council, based on their roles with regard to enactment of the ordinance. The case was tried and the jury found defendants liable on the ground that plaintiff's constitutionally-protected speech was a substantial or motivating factor in the elimination of her position by way of the ordinance. 523 U.S. at 47-48.

The Supreme Court reversed and held that the defendants were entitled to absolute immunity. The Court stated that for

purposes of legislative immunity analysis, a court should not examine the defendants' intent, but instead must resolve "the logically prior question of whether their acts were legislative. Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54. With regard to the mayor, the Court concluded that his actions of introducing the budget and signing the ordinance into law were legislative. *Id.* at 55. The Court emphasized that "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions," and the mayor's "actions were legislative because they were integral steps in the legislative process." *Ibid.*

The Court further determined that the defendants' actions were shielded from suit because the ordinance was substantively legislative.[4] As noted above, the Court emphasized that the focus is on the nature of the challenged action, rather than on the intent underlying it. According to the Court, the ordinance "bore all the hallmarks of traditional legislation." *Ibid.* The Court explained:

> The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city council, in

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[4] Petitioner incorrectly states the Court in *Bogan* "reserved judgment" on the issue of whether an activity must be substantively legislative (Petition at 16). Instead, the Court addressed this issue and determined that the acts of defendants were both procedurally and substantively legislative. *Id.* at 55. The Third Circuit opinion below expressly stated that this is its understanding of *Bogan*, and therefore the Third Circuit applied the two-part "procedural and substantive" test here (Pa13, n.8).

> eliminating DHHS, certainly governed "in a field where legislators traditionally have power to act." *Tenney, supra*, at 379, 72 S.Ct., at 789. [*Ibid.*].

The Third Circuit applied precisely these standards here in determining that the New Jersey statute in question fulfills the substantively legislative test as set forth in *Bogan*. The statute of which plaintiff complains, in repealing *N.J. Stat. Ann.* §52:16A-26.9, plainly constituted "traditional legislation." In enacting it, the Legislature made the policy determination that New Jersey should not continue to have the position of poet laureate and should no longer award the William Carlos Williams citation and an honorarium every two years. The termination of the award program and the poet laureate position has "prospective implications that reach well beyond the particular occupant of the office." *See Bogan, supra*, 523 U.S. at 55. The repeal statute had numerous prospective implications that are the hallmarks of legislation: it abolished a position and an award program; it had the budgetary impact of eliminating the need to appropriate funds in the State budget for an honorarium; and it relieved the State Arts Council of the duty to convene, on a biennial basis, poet laureate selection panels of the New Jersey Council for the Humanities.

Thus, the decision here is fully consistent with the rule that the elimination of a position by legislation is a substantively legislative act because of its prospective effect beyond the holder of that office. *See also State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007); *Gallas v. Supreme Court of Penn.*, 211 F.3d 760, 776 (3rd Cir. 2000); *Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988). There is no disagreement among the circuits as to how to determine whether an act is substantively legislative. The Supreme Court's standards in this regard are clear, and consequently the lower courts have had no difficulty in applying them.

The cases cited by petitioner do not demonstrate a conflict between the Third Circuit decision below and other circuit court decisions. Instead, these cases involve facts which are

materially different from the facts here, and therefore legislative immunity did not apply in those matters. Unlike the present case, the cases cited involve administrative actions taken against an individual, rather than the legislative action of elimination of a position. *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000) (selective layoffs of particular employees); *Canary v. Osborn*, 211 F.3d 324 (6th Cir. 2000) (termination of specific employees); *See also Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (holding that municipal decisions concerning development applications are not legislative); *Haskell v. Washington Tp.*, 864 F.2d 1266 (6th Cir. 1988) (enforcement of zoning ordinance); *Cutting v. Mazzey*, 724 F.2d 259 (1st Cir. 1984) (conditions imposed on a developer's application); *Hughes v. Tarrant County*, 948 F.2d 918 (5th Cir. 1991) (denial of an employee's request to be reimbursed for attorney fees); *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995) ("this case does not involve the elimination of a position...."); *Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003) (denial of permit request to a specific applicant); *Bechard v. Rappold*, 287 F.3d 827 (9th Cir. 2002) (termination of employee seventeen months before eliminating his position).

It is apparent that the cases cited by petitioner underscore the point that the Third Circuit correctly followed *Bogan* and other case law in concluding that the New Jersey statute was a substantively legislative action.

Plaintiff also attempts to avoid legislative immunity by claiming that there is no such immunity where, as here, it is alleged that defendants' legislative actions were motivated by the intent to abridge plaintiff's First Amendment rights. However, as discussed above, legislative immunity applies without regard to considerations of defendants' intent or motive. *Bogan, supra*, 423 U.S. at 55; *Youngblood v. DeWeese*, 352 F.3d 836, 841 (3d Cir. 2003). Indeed, petitioner relies upon cases which applied this rule and granted legislative immunity in the face of a claim that the official acted with ill-intent toward the plaintiff. *See Torres Rivera v. Calderon Serra*, 412

F.3d 205, 213 (1st Cir. 2005) (Petition at 13, n.6) (granting legislative immunity to Governor for signing legislation and rejecting argument that this immunity may be abrogated if the legislation's enactment was motivated by impermissible intent); *De la Biblia Abierta v. Banks*, *supra*, 129 F.3d at 903 (petition at 13). In the other cases upon which plaintiff relies, the courts considered defendants' intent only after determining – as *Bogan* requires – that the nature of the act in question was not substantively legislative. In the present matter, in contrast, the substantively legislative nature of the statute forecloses consideration of the alleged improper intent underlying enactment of this legislation.

Petitioner's contention that immunity does not apply because the statute in question, as opposed to the individual defendants, had the purpose of removing him from the poet laureate position simply is not supported by *Bogan*. The plaintiff in *Bogan* made precisely the same claim in alleging that the city council had enacted an ordinance aimed exclusively at removing her from office due to the exercise of her First Amendment rights. A jury found that the ordinance was so motivated and the District Court denied legislative immunity on the basis that the ordinance "was an individually-targeted administrative act...." 523 U.S. at 48. The Supreme Court firmly rejected this approach and held that the only relevant consideration is whether the defendant's act is legislative. *Id.* at 54. *See also State Employees*, *supra*, 494 F.3d at 90.

Thus, the Third Circuit correctly determined that legislative immunity applied. No circuit court conflict, deviation from Supreme Court precedent, or unsettled legal issue is presented here.

II. THE THIRD CIRCUIT'S DECISION THAT LEGISLATIVE IMMUNITY BARS PETITIONER'S CLAIM AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITIES FOR INJUNCTIVE RELIEF -- REINSTATEMENT TO THE LEGISLATIVELY REPEALED POST OF POET LAUREATE OF NEW JERSEY -- IS FULLY CONSISTENT WITH THE CASE LAW OF THIS COURT AS WELL AS ALL CIRCUIT COURTS.

In accordance with the holding of this Court in *Supreme Court of Virginia*, the Third Circuit held that legislative immunity barred petitioner's official capacity claims for injunctive relief. Contrary to petitioner's assertion, in fact there is no conflict among the circuit courts with regard to this principle of law; all circuit courts have agreed with the Third Circuit that *Supreme Court of Virginia* extends legislative immunity to prospective relief sought against officials in their official capacity.

In addition, there is another reason why Supreme Court review is unwarranted. Petitioner seeks reinstatement to a position which no longer exists by virtue of the legislation repealing the poet laureate statute. Accordingly, as the Third Circuit appropriately recognized, the relief sought would require New Jersey legislators to rescind their votes on the repeal statute and to vote in favor of re-enactment of the former statute. Such judicial intrusion into legislative affairs is plainly contrary to this Court's legislative immunity jurisprudence.

A. The Law Is Settled That Legislative Immunity Bars Official Capacity Claims For Injunctive Relief.

In *Supreme Court of Virginia v. Consumers' Union*, 446 U.S. 719 (1980), plaintiffs challenged attorney disciplinary rules promulgated by the Supreme Court of Virginia and sued the Virginia Court and its chief justice. The chief justice was sued in both his individual and official capacity. *Id.* at 724.

This Court held that the Virginia Court and its chief justice were entitled to legislative immunity with regard to their promulgation of the rules. *Id.* at 732-34. The Court observed that pursuant to its precedents, the Speech or Debate Clause "immunizes Congressmen from suits for either prospective relief or damages," *id.* at 731, with the purpose of protecting legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.* at 732, quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The Court noted that the state legislators enjoy immunity similar to that accorded to Congressmen under the Speech or Debate Clause, citing *Tenney v. Brandhove*, *supra*. *Ibid.* The Court stated that *Tenney* held that §1983 did not abrogate the common law immunity of state legislators, and although *Tenney* involved an action for damages, "its holding is equally applicable to §1983 actions seeking declaratory or injunctive relief." *Ibid.* The Court emphasized that in *Tenney*,

> We did not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that 'a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' [*Id.* at 733, quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975].

For these reasons, the Court held that the Virginia Court and its members were immune from suit on the basis of legislative immunity. *Id.* at 734.

Thus, *Supreme Court of Virginia* unambiguously holds that legislative immunity bars official capacity claims for injunctive relief. Every circuit court which has considered the issue has understood this to be the rule established in *Supreme Court of Virginia*. Most recently, in *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007), the Second Circuit, in considering the legislative immunity of Connecticut officials (including the Governor) for abolition of state

employee positions in the budget process, held that *Supreme Court of Virginia* established the rule that legislative immunity bars claims for injunctive relief against state officials in their official capacities. *Id.* at 83-84. The Court characterized that Supreme Court opinion as "squarely-applicable precedent." *Id.* at 86-87. It also noted that in *Supreme Court of Virginia*, the Supreme Court cited approvingly the Second Circuit's decision in *Star Distribution, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), which held that legislative immunity bars an action for declaratory and injunctive relief. *Id.* at 84, citing *Supreme Court of Virginia*, 446 U.S. at 732 n.10.

The Eleventh Circuit has similarly held that *Supreme Court of Virginia* requires the conclusion that legislative immunity covers official capacity prospective relief claims. *Scott v. Taylor*, 405 F.3d 1251, 1253-56 (11th Cir. 2005). The Third Circuit, of course, reached the same conclusion in the present case. In addition, it has previously determined that "in fact the Supreme Court in *Consumers Union* did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative." *Larsen, supra,* 152 F.3d at 252. The First, Sixth, and Seventh Circuits have reached the same result. *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1101 (6th Cir. 1990) (legislative immunity "applies whether the relief sought is money damages or injunctive relief"); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 91 (1st Cir. 1985).

In contrast, petitioner is unable to cite a single reported case in which a circuit court has construed *Supreme Court of Virginia* differently and has held that legislative immunity does not bar official capacity injunctive relief claims. Petitioner instead points to cases which indicate that other immunities, such as prosecutorial and qualified, do not apply to official capacity suits. *See Turner v. Houma Mun. Fire and Police Civ. Serv.*, 229 F.3d 478, 483 (5th Cir. 2000); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999); *Supreme Video,*

Inc. v. Schauz, 15 F.3d 1435, 1442 (7th Cir. 1994).[5] These cases have no relevance to the settled law which pertains specifically to the protection from suit, not just damages, afforded by legislative immunity.

Accordingly, there is no circuit court conflict, or indeed any uncertainty in this area of the law. The circuit courts have consistently followed the unequivocal holding of *Supreme Court of Virginia* that legislative immunity cuts off official capacity injunctive relief claims which are based on legislative conduct.

Petitioner's reliance on dicta in *Kentucky v. Graham*, 473 U.S. 159 (1985) is unavailing. Petitioner places undue weight on a comment in that opinion to the effect that personal immunity defenses are unavailable in an official capacity action. *Id.* at 167. As the Second Circuit has noted, this general dicta plainly does not overrule the "squarely-applicable precedent" of *Supreme Court of Virginia* on the specific question of legislative immunity in an official capacity action. *State Employees, supra.* Indeed, petitioner's interpretation of *Kentucky v. Graham* is contradicted in the Court's opinion, where the Court observed that in *Supreme Court of Virginia* it considered a suit against the Virginia Court and chief justice "in his official capacity" and "we held that absolute immunity shielded these defendants for acts taken in their legislative capacity." *Id.* at 164. *See also Spallone v. United States*, 493 U.S. 265, 278 (1990) ("We applied this same doctrine of legislative immunity ... to actions for both damages and injunctive relief in *Supreme Court of Virginia*").

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[5] *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 135 (5th Cir. 1986) does not address the holding of *Supreme Court of Virginia* in this regard presumably because the *Minton* court did not resolve the issue of whether the defendants engaged in legislative or administrative actions.

As noted, no circuit court has understood the rule to be other than what the Third Circuit held here — that legislative immunity bars official capacity injunctive relief claims. Since the purpose of legislative immunity, according to the Supreme Court, is to free legislators from the distractions of suits concerning their legislative actions, *Supreme Court of Virginia*, *supra*, 446 U.S. at 733, there is no basis for the argument that official capacity suits for injunctive relief against legislators may proceed.

B. The Prospective Relief Sought By Petitioner is Barred by Legislative Immunity Because it Would Require Legislators To Rescind Their Votes On The Challenged Legislation And Cast Votes Enacting New Legislation.

The Third Circuit concluded that there is an additional reason to apply legislative immunity to the injunctive relief claim: the remedy sought by petitioner would infringe on the role of the New Jersey Legislature. Petitioner seeks reinstatement as poet laureate of New Jersey. However, there is no such position in existence as a result of the enactment of the statute which repealed the prior legislative creation of the position. As a result, the relief sought by petitioner necessarily requires that the court undo the Legislature's repeal statute and order the Legislature to re-enact the repealed law. It cannot be reasonably disputed that this result would, as the Third Circuit said, "seriously interfere with the role assigned exclusively to the Legislature." (Pa21).

The Third Circuit's earlier decision in *Larsen*, upon which it relied here, presented a similarly improper request for injunctive relief against legislators. Larsen, a state Supreme Court justice, challenged the state Senate's impeachment of him and sought reinstatement to his judicial post. Since such reinstatement would require that individual senators rescind their impeachment votes, the court declined to interfere with the legislators in such fashion. 152 F.3d at 254.

In *State Employees*, *supra*, the Second Circuit explained further the rationale underlying the foregoing principle. The court indicated its agreement with the Third Circuit that, "in considering whether the doctrine of legislative immunity is available to foreclose claims for injunctive relief in official-capacity suits, we must also look more specifically to whether granting the particular relief sought would enjoin defendants in their legislative capacities." *Id.* at 88 (emphasis in original). The Second Circuit observed that this analysis is required by *Supreme Court of Virginia*. In that case, the Supreme Court held that legislative immunity barred injunctive relief seeking to compel performance of legislative actions such as repeal or amendment of the bar code that had been promulgated. However, as the Second Circuit recognized in *State Employees*, the Supreme Court stated in *Supreme Court of Virginia* that injunctive relief claims could be brought with regard to future actions that involve the administrative function of enforcing the code's provisions. *See* 446 U.S. at 736. Enforcement is not a legislative act and therefore is not subject to legislative immunity.

The Second Circuit properly applied this distinction and held that legislative immunity did not prohibit reinstatement of plaintiffs to other existing state positions, rather than their abolished positions. According to the court, placement of the plaintiffs in other existing positions would compel administrative action only. *Id.* at 93. In contrast, legislative immunity bars reinstatement to the previously-held positions "because ordering such relief would require no less than a judicial order compelling defendants, in their official capacities, to re-create positions that would have been eliminated through prior legislative actions." *Id.* at 94. In other words, this "would compel the rescission of an existing budget agreement and the enactment of new budget legislation — precisely the activity which the legislative immunity privilege seeks to protect." *Ibid.*

Similarly, in this case, petitioner seeks a judicial order that would compel rescission of legislators' votes enacting legislation – P.L. 2003, c. 123, the repealer statute – and the

enactment of new legislation providing for re-creation of the legislatively-eliminated poet laureate position. Without such votes by individual legislators, there is no poet laureate position in existence and therefore no reinstatement remedy.

Petitioner cites no cases which suggest that a court may order legislators to enact legislation. He simply states that he seeks a court order compelling state officials to reinstate him to the poet laureate position. The obvious flaw in this argument is that, pursuant to statute, there is no poet laureate position in which petitioner could be placed.

Spallone v. United States, 493 U.S. 265 (1990), mentioned in the petition with regard to remedy, is not applicable as it deals with the different situation of a consent decree covering a city council. More important, *Spallone* actually confirms that legislative immunity precludes the courts from fashioning injunctive relief which intrudes upon the legislative process. The Court held that in view of principles of legislative immunity, the district court erred in holding the council members in contempt for refusing to vote in favor of legislation implementing the consent decree. *Id.* at 278-80.

Thus, petitioner has not raised a question worthy of *certiorari*. The Supreme Court has issued clear precedent stating that legislative immunity bars official capacity injunctive relief, and the circuit courts, including the Third Circuit, have rendered consistent rulings upholding this principle.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 07-79

OCT 22 2007

IN THE

Supreme Court of the United States

AMIRI BARAKA,

Petitioner,

v.

JAMES E. MCGREEVEY, individually; JON CORZINE, in his official capacity as Governor of the State of New Jersey, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

Respondents' Brief in Opposition does nothing to allay the concern expressed in Judge Nygaard's dissent that extending absolute legislative immunity to Governor McGreevey and Arts Council Chairperson Harrington for their campaign to oust petitioner Amiri Baraka from his poet laureate position "expands the legislative immunity privilege to insulate almost every action taken by executive branch officials having some connection, however remote, with the passage of legislative acts." Pet. App. 36a. Respondents point to no formal act taken by the Governor or Arts Council Chairperson that would qualify as *procedurally* legislative under this Court's precedents. They selectively describe circuit law so as to mask the degree of difference among the circuits regarding when an act is *substantively* legislative. The fact is, no other circuit court decision has gone so far as to grant a governor legislative immunity for an act other than signing or vetoing legislation.

Respondents' analytical confusion on the second question presented further buttresses the need for this Court to grant certiorari. Respondents perpetuate the court of appeals' error by insisting that *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980), "unambiguously holds that legislative immunity bars official capacity claims for injunctive relief," Opp. 18—in the face of explicit language in *Consumer Union* to the contrary. Certainly, the majority of circuits, in contrast to the Second, Third, and Eleventh Circuits, have not read *Consumers Union* to block lawsuits against government officials in their official capacities, seeking injunctive relief to prevent enforcement of unconstitutional laws. Respondents can claim there is no circuit split only by outright ignoring or discounting the many circuit court decisions that have squarely held that personal immunities, including legislative immunity, cannot be asserted in defense of an official-capacity lawsuit, which, in reality, is an action against the government entity, not the named officials.

ARGUMENT

I. Legislative Immunity for Respondents

A. Respondents contend that this Court need not review whether their conduct was procedurally legislative for purposes of legislative immunity because the Third Circuit correctly held that their actions leading to enactment of the statute eliminating Baraka's position as poet laureate were "unquestionably acts integral to the legislative process." Opp. 7.

Yet respondents concede that legislative immunity covers only those acts that are actually "part of the legislative process," not merely those acts that are "casually or incidentally related to legislative affairs." Opp. 8 (quoting *United States v. Brewster*, 408 U.S. 501, 516 (1972)). They agree with Baraka that this Court has extended legislative immunity only to formal legislative acts, such as voting for legislation or a resolution, preparing committee investigative reports, addressing a legislative committee or body, introducing a budget, and signing or vetoing legislation. *See* Opp. 9; Pet. 12. They admit that other types of political activities that may have some bearing on legislative affairs, but are not actually part of the legislative process—such as performing services for constituents, sending newsletters to constituents, issuing news releases, and delivering speeches outside the legislature—do not qualify for legislative immunity. Opp. 9.

From these agreed starting points, however, respondents make the unjustified leap that the Third Circuit correctly ruled that Governor McGreevey and Chairperson Harrington enjoy legislative immunity simply because Baraka's complaint alleged that McGreevey and his agents "orchestrated and directed" a campaign to terminate Baraka from his position as New Jersey poet laureate. *Id.* at 10; *see* 2d Am. Cmplt. ¶¶ 18-20 (R. 3). There is no basis for arguing from that simple allegation, which, consistent with basic rules of notice pleading, has not yet been fleshed out, that respondents engaged in formal acts that "were integral steps in the legislative process," *Bogan*

v. Scott-Harris, 523 U.S. 44, 55 (1998), comparable to the *Bogan* mayor's introducing a budget and signing it into law.

That the New Jersey governor has the authority to recommend measures to the Legislature, *see* Opp. 11, is irrelevant because, as Baraka has pointed out, *see* Pet. 15, without contradiction from respondents, Governor McGreevey did *not* carry out his campaign to remove Baraka through a formal message to the legislature recommending a legislative measure. Likewise, that the New Jersey governor has the authority to veto bills, *see* Opp. 11, does not render his every act leading up to the passage of legislation itself legislative. Without an allegation in the complaint supporting their contention that the Governor's actions were integral steps in the legislative process, respondents are forced to fall back on the Governor's signing the repealer bill into law, *id.* at 10, even though both here and in the lower courts, petitioner disavowed reliance on that act as a basis for his claim. *See* Pet. 8; Pet. App. 10a. Furthermore, respondents make no effort to explain what formal acts the Arts Council Chairperson could possibly have taken to entitle her to legislative immunity.

The complaint's allegations regarding McGreevey's and Harrington's "concerted campaign . . . to remove or terminate" Baraka, *see* 2d Am. Cmplt. ¶ 18, are better understood to protest respondents' *political* actions in instituting a drive to oust Baraka from his post—a campaign McGreevey instigated immediately after Baraka's reading of his controversial poem when he directed Harrington not to pay Baraka his authorized honorarium. *Id.* ¶ 17. As the dissent below rightly observed, "the central inquiry for non-legislators is whether the official was performing legislative functions." Pet. App. 41. The complaint is bereft of allegations supporting respondents' claim that they had performed such legislative functions.

B. Respondents also maintain that there is no need for this Court to review whether respondents' actions (and the New Jersey legislature's elimination of the poet laureate position itself) were substantively legislative. Opp. 12-16. Their

argument rests both on an effort to brush off the circuit split that has developed regarding the significance of a law's singling out a particular individual for differential treatment and on a misreading of *Bogan*. Although they contend that the repealer statute has prospective implications, respondents do not even try to dispute that the act, by taking effect during Baraka's tenure, rather than prospectively, singled out Baraka—and Baraka alone—for disciplinary action, as was the act's clear purpose. That the facts underlying the decision to abolish the poet laureate position were specific to Baraka and that the repealer treated Baraka differently from all other would-be poet laureates would have led the First, Fourth, Fifth, Sixth, and Ninth Circuits to hold that the elimination of his position was *not* a substantively legislative act. *See* Pet. 18-21.

Respondents attempt to minimize this disagreement among the circuits by making the question-begging assertion that the cases cited by petitioner involved "*administrative* actions taken against an individual, rather than the *legislative* action of elimination of a position." Opp. 15. But the termination of Baraka's position as poet laureate likewise was an administrative act. Unlike the Third Circuit, other circuits do not treat the legislative elimination of a position or other formally legislative activities as sacrosanct acts that can never be probed to determine whether they in fact bear "the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55. For example, respondents dismiss the First Circuit's decision in *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), with the notation that it involved "selective layoffs of particular employees." Opp. 15. But the First Circuit denied the mayor legislative immunity for laying off employees even though the mayor's layoff plan was ratified by the Assembly, which enacted an ordinance eliminating 102 positions. 204 F.3d at 5; *see also* Pet. 18. Similarly, here, McGreevey's directive to Harrington to withhold Baraka's honorarium was ratified when the New Jersey legislature abolished Baraka's position.

Respondents' partial quotation of a statement in *Alexander*

v. Holden, 66 F.3d 62 (4th Cir. 1995), *see* Opp. 15, displays the degree of hair-splitting they must undergo to negate a circuit conflict. The Fourth Circuit observed that "this case does not involve the elimination of a position through a Board's preparation of a budget ordinance, but rather the elimination of a particular position's salary, [and] the consolidation of that position with another." 66 F.3d at 67. For purposes of determining whether an act is substantively legislative, however, there is no difference between eliminating a position's salary and then combining that position with another, and simply abolishing the original position. As the court found in *Alexander*, "[b]oth the facts underlying the commissioners' decision and the impact of the commissioners' decision were specific, rather than general, in nature." *Id.*[1]

Respondents' argument that it is irrelevant whether the legislative purpose of the repealer statute was to terminate Baraka as poet laureate, *see* Opp. 16, misreads *Bogan*. If respondents are right that elimination of a position by statute is *always* a legislative and not an administrative act, then it would not matter, for purposes of legislative immunity, if the statute announced outright in its text—"whereas, because the people of New Jersey are gravely offended by Amiri Baraka's reading of his poem 'Somebody Blew Up America,' we hereby eliminate the position of Poet Laureate of New Jersey to ensure that Mr. Baraka's service as poet laureate is terminated forthwith." Nothing in *Bogan* suggests that such a forthright termination of

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[1] Similarly, in other contexts, circuits following the First Circuit's approach have emphasized the importance of whether an act singles out particular individuals for differential treatment. *See Bryan v. City of Madison*, 213 F.3d 267, 273-74 (5th Cir. 2000) (various vetoes and votes of mayor were administrative acts because they were based on specific facts and differently affected one property development); *Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988) (remanding for assessment whether trustees' enactment of zoning ordinances was administrative or legislative, noting that actions singling out specifiable individuals for differential treatment would be administrative); *see also* Pet. 18-19.

a specified person from a state office would constitute a substantively legislative act. In *Bogan*, the city council eliminated 135 city positions (including the plaintiff's) as part of a budgetary package. 523 U.S. at 47. Here, a single position was eliminated, affecting the position's holder mid-term, with not even a pretense of a budgetary impact. In *Bogan*, the court of appeals had relied on particular legislators' subjective intent. *Id.* at 54; *see also Scott-Harris v. City of Fall River*, 134 F.3d 427, 438-39 (1st Cir. 1997) (lower court decision) (describing evidence of mayor's and particular councilors' motives). Here, no inquiry into legislators' subjective intent or motives is necessary. The purpose of the repealer statute is as clear from the accompanying legislative events and written legislative statements, *see* Pet. 4-7, as if the act had been crafted in the hypothetical language above—to remove Amiri Baraka from his post as poet laureate, a quintessentially *administrative* act.

II. Prospective Injunctive Relief in Official-Capacity Suits

Respondents' contention that there is no circuit split on the second question presented is inexplicable. They argue that petitioner has not cited a single case in which a circuit court has construed *Consumers Union* to hold that prospective legislative immunity does not bar claims seeking injunctive relief against government officials in their official capacities. Opp. 19-20. But respondents ignore the Eighth Circuit's decision in *Redwood Village Partnership v. Graham*, 26 F.3d 839 (8th Cir. 1994), cited in the Petition at 24. There, plaintiffs sued state agency officials for their promulgation of regulations. Discussing *Consumers Union*, the Eighth Circuit held that these officials had legislative immunity, but emphasized that "[t]he absolute immunity we confer upon the Department officials is for their conduct of rulemaking. Suits for declaratory and injunctive relief are still available to challenge regulations." *Id.* at 842. So, too, here: If respondents have legislative immunity, petitioner can still challenge the constitutionality of the repealer statute by seeking to enjoin its enforcement.

The Fifth Circuit likewise has held that legislative immunity does not "bar injunctive relief or suits in which officials are sued only in their official capacities and, therefore, cannot be held personally liable." *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134 (5th Cir. 1986).[2] Moreover, the rationales of the cases from several circuits cited in the Petition and dismissed by respondents because they involved other types of personal immunities, apply fully to legislative immunity. Such decisions, holding that absolute and qualified immunities are inapplicable in official-capacity suits, are in direct conflict with the decisions of the Second, Third, and Eleventh Circuits. *See* Pet. 23-24 & n.10 (citing cases). These decisions often rely on the clear statement in *Kentucky v. Graham*, 473 U.S. 159, 167 (1985), that "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess," which respondents brush aside as dicta. Opp. 20. Yet this Court repeatedly embraced this distinction between individual-capacity and official-capacity suits since *Graham* was decided. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 n.* (1996); *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *see also* Pet. 26 & n.11.

The four circuit cases cited by respondents (at 19) for the proposition that legislative immunity bars claims for prospective relief, at best, only deepen the circuit conflict, but in fact, they are inapposite because they do not address whether legislative immunity blocks official-capacity suits for injunctive

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[2] Respondents implicitly recognize *Minton*'s holding by speculating that the Fifth Circuit allegedly ignored *Consumers Union* because it had not resolved the issue of whether the defendants engaged in legislative or administrative actions. Opp. 20 n.5. But the Fifth Circuit's reason for finding legislative immunity unavailable was one that would apply regardless of the type of action defendants engaged in. *See Minton*, 803 F.2d at 134 ("official immunity doctrines" are premised on the concern that the threat of personal liability may deter government officials in conducting their offices and thus do not apply when officials are not threatened with personal liability).

relief. Indeed, two of them pre-date *Graham*. If anything, two of these cases support petitioner's side of the circuit split by drawing the precise distinction Baraka relies on here: between an action to enjoin or compel a legislative action itself (*e.g.*, voting for or vetoing a bill)—which Baraka does not seek—and an action to enjoin enforcement of the law once enacted—which Baraka does seek. *See Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) (ruling that legislative immunity bars an injunction against the governor's use of a partial veto provision, but officials enforcing the laws created in the allegedly unconstitutional manner would be proper defendants); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 91 (1st Cir. 1983) (holding that legislative immunity barred enjoining Puerto Rico Senate activities while recognizing that a court had "the undeniable power . . . to enjoin the enforcement of acts passed by the legislature").

The distinction that these and other circuits have made between a lawsuit seeking to compel a legislator to cast a vote or to prevent a governor from exercising a veto, on the one hand, and an action against an official with enforcement authority to prevent the *enforcement* of (or to redress the consequences of) an unconstitutional law, on the other hand, is the same one that has eluded both the Third Circuit and respondents. *Consumers Union* did not "unambiguously hold[] that legislative immunity bars official capacity claims for injunctive relief." Opp. 18. It held that legislative immunity barred injunctive relief against the Virginia Supreme Court and its chief justice in the form of an order that they amend the Bar Code. 446 U.S. at 731-34; *see also* Pet. 27 & n.12 (discussing limits on court authority to compel legislative acts). The Court explained, however, that because the Virginia Court and its chief justice had independent enforcement authority, *id.* at 734-37, "prospective relief was properly awarded against the chief justice in his official capacity." *id.* at 737 n.16; *accord Graham*, 473 U.S. at 164 n.8 (Court held in *Consumers Union* that the chief justice in his official capacity could be enjoined

from enforcing the State Bar Code).

The situation here is exactly parallel: regardless of whether McGreevey and Harrington enjoy legislative immunity for campaigning to oust Baraka, they have independent enforcement authority and could properly be sued in their official capacities for prospective relief enjoining enforcement of the act abolishing the poet laureate position as applied to Baraka. Courts have the power to adjudicate the constitutionality of a legislative action in a suit to enjoin its enforcement. *E.g.*, *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (addressing lawfulness of actions by House of Representatives through suit against House Sergeant of Arms, who executed the warrant); *accord Powell v. McCormack*, 395 U.S. 486, 501-06 (1969); *see also* Pet. 23. Oddly, respondents seem to concede as much. *See* Opp. 22 ("Enforcement is not a legislative act and therefore is not subject to legislative immunity.").

Because Baraka seeks reinstatement to his position as poet laureate and not an order requiring the New Jersey legislature to re-enact the repealed law, respondents' final argument embracing the Third Circuit's view that affording relief to Baraka would require legislators to recast their votes, Opp. 21-23; Pet. App. 21a, misses the mark. Baraka did not even sue state legislators, in contrast to the suit against state senators in *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998), *cited in* Pet. App. 20a-21a. Respondents argue that if Baraka were to prevail on the merits, he could not secure reinstatement to his position because "there is no poet laureate position in existence" as a result of the enactment of the repealer statute. Opp. 23. Respondents' position that the judiciary would be incompetent to afford Baraka a remedy, if he prevailed in establishing that the statute was unconstitutional, is a curious one. It treats elimination of a state position as some sort of special case where the judiciary would be powerless to rectify the constitutional wrong. Respondents' logic suggests that courts are powerless to afford injunctive relief to redress a constitutional violation whenever

such relief runs counter to the previously expressed wishes of the legislature.[3] And yet, as this Court has recognized—

> it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

Kilbourn, 103 U.S. at 199 (citation omitted). If Baraka established the unconstitutionality of the statute as applied to him, the act's elimination of his position would be "null and void." There would be nothing anomalous, then, about a court ordering executive officials to reinstate him.

It critically important that the Court grant certiorari on the second question presented to clear up once and for all whether legislative immunity applies in an action against state officials sued in their official capacities.

CONCLUSION

The petition for certiorari should be granted.

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[3] Counterexamples are too numerous to be done justice here, but just to name a few—this Court has declared that the House of Representatives was without power to exclude Adam Clayton Powell from its membership, despite an earlier House resolution excluding Powell from his seat and declaring that seat vacant, *see Powell*, 395 U.S. 486; it has excised from the federal sentencing scheme the statutory provisions that make the Federal Sentencing Guidelines mandatory, *see United States v. Booker*, 543 U.S. 220 (2005); it has held state apportionment of congressional districts unconstitutional, *see Wesberry v. Sanders*, 376 U.S. 1 (1964), with the result that lower courts ordered their own reapportionments pending further legislative action, *see, e g., Roberts v. Babock*, 246 F. Supp. 396 (D. Mont. 1965); and in *Ex Parte Young*, 209 U.S. 123 (1908) itself, the Court held that a state attorney general could be enjoined from enforcing unconstitutional railroad rate provisions, even though the ruling presumably would leave in effect previous rates superseded by the legislature.

Respectfully submitted,

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